



National  
Defence

Défense  
nationale

JUDGE ADVOCATE GENERAL



# JAG ANNUAL REPORT 2021-2022



Canada 



Office of the Judge Advocate General  
National Defence Headquarters  
101 Colonel By Drive  
Ottawa, ON K1A 0K2  
Telephone: (613) 992-3019  
CSN: 992-3019  
Fax: (613) 992-5678

Cat. No. D1-16  
ISSN 1497-7184

The Annual Report  
of the Judge Advocate General  
to the Minister of National Defence  
on the Administration of Military Justice  
from 1 April 2021 to 31 March 2022





# CONTENTS

COMMUNIQUÉ .....	III
------------------	-----

## WHO WE ARE: THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General .....	1
Command of the Office of the Judge Advocate General .....	1
Office of the Judge Advocate General .....	2
Office of the Judge Advocate General Chief Warrant Officer .....	4
Director of Military Prosecutions .....	5
Director of Defence Counsel Services .....	7
Chief of Staff and Corporate Services Division .....	9
Military Justice Division .....	11
Military Justice Modernization Division .....	13
Operational and International Law Division .....	15
Administrative Law Division .....	17
Regional Services Division .....	18
Deputy Judge Advocate General Reserves .....	20
Legal Officers Serving Outside of the Office of the Judge Advocate General .....	21
Civilian Personnel of the Office of the Judge Advocate General .....	21

1

## THE CANADIAN MILITARY JUSTICE SYSTEM: STRUCTURE AND STATISTICS

Canada's Military Justice System .....	23
The Structure of the Military Justice System .....	24
The Code of Service Discipline .....	24
The Two Tiers of the Military Justice System .....	24
Summary Trials .....	25
Courts Martial .....	26
Statistics .....	28
Summary Trials .....	28
Courts Martial .....	35

2

# 3 MILITARY JUSTICE: THE YEAR IN REVIEW

Introduction .....	39
Jurisprudence .....	39
Court Martial – Decisions of Note .....	39
Court Martial Appeal Court of Canada Decisions .....	41
Supreme Court of Canada .....	44

# 4 MILITARY JUSTICE: EVOLUTION, TRANSFORMATION AND MODERNIZATION

Introduction .....	47
Independent Reviews .....	47
The Third Independent Review .....	48
Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces .....	49
Governance structure for the Implementation of External Comprehensive Reviews .....	49
Bill C-77 .....	50
Legislative and Regulatory Development and Implementation .....	50
Consultation and Engagement in Support of the Implementation of the DVR .....	50
Overview of Changes and Impacts on the Military Justice System .....	51
The Superintendence Enhancement and Assessment Project .....	53
The Justice Administration and Information Management System (JAIMS) .....	53
Military Justice System Performance Monitoring Framework .....	54
Military Justice System Time Standards .....	54
Other Policy Initiatives .....	55
The Military Justice Stakeholders' Forum .....	55

# 5 THE WAY AHEAD

The Way Ahead .....	57
Conclusion .....	58

## ANNEXES

Annex A: Summary of Charges Disposed of at Summary Trial
Annex B: Summary of Charges Disposed of at Court Martial
Annex C: Director of Military Prosecutions Annual Report 2020-2021
Annex D: Annual Report 2020-2021 Director of Defence Counsel Services

# COMMUNIQUÉ

Pursuant to Subsection 9.3(2) of the *National Defence Act*,<sup>1</sup> the Judge Advocate General (JAG) is required to report annually to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces.

Under section 9.1 of the Act, the JAG acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Armed Forces in matters relating to military law. The JAG also superintends the administration of military justice in the Canadian Armed Forces pursuant to section 9.2 of the Act. In carrying out these duties and functions, the JAG is responsible to the Minister of National Defence.

This report covers the period from April 1, 2021, to March 31, 2022, and the reporting period marks another full and challenging year for the Office of the JAG. While continuing to operate within the grips of the COVID-19 pandemic, the Office of the JAG provided wide reaching legal services in support of ongoing Canadian Armed Forces operations as well as its persistent efforts to effect necessary growth and change across the organization including within the military justice system.

## Evolution & Change

The principal theme that runs throughout this report is that the 2021-2022 reporting period has seen the military justice system advance on the latest leg of its journey of continuous evolution and growth.

This is a journey that began in 1998 with the implementation of amendments to the *National Defence Act* that ushered in significant changes to the military justice system and embedded a statutory requirement for the conduct of periodic independent reviews of the Code of Service Discipline and other parts of the *National Defence Act*.<sup>2</sup>

<sup>1</sup> *National Defence Act*, RSC 1985, c N-5.

<sup>2</sup> Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 [Bill C-25].

It is a journey that has continued over the subsequent decades. Aided by regular and rigorous scrutiny and analysis provided by a range of audits, independent reviews and judicial decisions, the military justice system has adapted over time to reflect changes in Canada's legal and societal norms and to bolster its contribution to the operational effectiveness of the Canadian Armed Forces by promoting the maintenance of discipline, morale and well-being within the Canadian Armed Forces.

It is a journey that is far from its end, and one that must proceed forward to bring change that is needed to strengthen the military justice system and rebuild confidence in it as an effective and vital instrument of accountability within the Canadian Armed Forces. Over the reporting period, the journey continued across three principal fronts that together will bring critical immediate changes to the military justice system, and at the same time, plot a course for future change that will see the military justice system continue to evolve in profound and wide-reaching ways.

First, Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*<sup>3</sup>, that would bring significant immediate change to the military justice system, including establishment of the Declaration of Victims Rights, was worked on extensively during the reporting period. Through a tremendous collaborative effort involving the Office of the JAG, many members of the Defence Team and Department of Justice legislative counsel, the consultations, policy development and regulatory drafting work required to finalize necessary regulatory amendments were completed, and approval to bring Bill C-77 into force on 20 June 2022 was obtained.

While outside the reporting period, we know as we write this report that Bill C-77 and its associated regulations came into force on 20 June 2022. Although beyond the scope of this report, the critical and positive change that these amendments bring for the victims of service offences and for the administration of military justice in general must be acknowledged. The implementation of the Declaration of Victims Rights, gives to victims of service offences, for the first time, statutorily protected rights - the same rights to information, participation, protection and restitution available in the civilian criminal justice system under the Canadian Victims

Bill of Rights. Of equal importance, victims of service offences will now have access to a dedicated complaint mechanism should they feel that their rights have been infringed and the possibility of receiving information and support from a trained Victim Liaison Officer.

Additionally, Bill C-77 also brings an important change to the structure of the military justice system with the retirement of summary trials and the introduction of summary hearings, which provide a non-penal process for addressing minor breaches of military discipline at the unit level. The summary hearing process is designed to enhance the responsiveness of the military justice system and allow the chain of command to swiftly and fairly address minor breaches of discipline and hold those who are responsible to account. An overview of the amendments and their implementation is provided in Chapter 4 of this report. Recognizing the importance of the changes that Bill C-77 brings to the military justice system, those changes are but one step in the larger journey of evolution and growth for the military justice system - further steps and changes are needed.

Second, in the *Report of the Third Independent Review Authority to the Minister of National Defence*,<sup>4</sup> which the Minister of National Defence tabled in Parliament on 1 June 2021, the Canadian Armed Forces was provided a recommended roadmap, which plots an ambitious course to effect important transformations of the military justice system. In the tabled report, 64 of the 107 recommendations made by the Third Independent Review Authority, the Honourable Morris J. Fish, former justice of the Supreme Court of Canada, provide a framework of recommended changes to the military justice system that is expansive and profound. The report recommends changes that, if implemented, would result in a generational overhaul of the structure and functioning of the military justice system and represent the most significant growth for the military justice system since its inception in the 1950s. The recommendations made by Justice Fish and the implementation commitments made during the reporting period are also examined in Chapter 4 of this report.

Third, at the outset of the reporting period, the Minister of National Defence launched a further review that would have important implications for the military justice system. *The Report of the Independent External*

3 Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (royal assent 21 June 2019). [Bill C-77]

4 Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021). [the Third Independent Review]



*Comprehensive Review of the Department of National Defence and the Canadian Armed Forces*,<sup>5</sup> led by the Honourable Louise Arbour, former justice of the Supreme Court of Canada, was commenced in April of 2021, with the mandate to review existing policies, procedures, programs, practices and culture within the Canadian Armed Forces and the DND to identify the causes of the continued presence of harassment and sexual misconduct in the Canadian Armed Forces. This mandate included the identification of any existing barriers to reporting inappropriate behaviour, including the presence of any such barriers within the military justice system. The Office of the JAG was pleased to support Justice Arbour in the conduct of her review, which is discussed in more detail in Chapter 1 of this report.

In October of 2021, Justice Arbour issued interim recommendations that would introduce a significant change to the way in which offences of a sexual nature are handled by the Canadian Armed Forces. Specifically, it was recommended that the investigation and prosecution of all sexual assaults and offences of a sexual nature be moved to civilian authorities. The interim recommendations and the positive response to them are discussed in greater detail in Chapter 4.<sup>6</sup> The final report of the Independent External Comprehensive Review was issued in May 2022, and while outside the timeframe of this reporting period, it is important to note that in the final report, Justice Arbour recommended that the interim recommendations become permanent through legislation - adding another important waypoint onto the roadmap for change. The contents of Justice Arbour's final report and the significant lasting change she recommends for the jurisdiction of the military justice system will be examined in future annual reports.

## **Conclusion**

This is an exciting and challenging time for the military justice system and for those dedicated professionals within the Canadian Armed Forces and the Department of National Defence who are assisting the Minister of National Defence to develop a comprehensive road map for implementation based on the recommendations of Justices Fish and Arbour. The roadmap will guide the Canadian Armed Forces through future legs of the journey to evolve and transform the Canadian military justice system. Significant and meaningful change does not happen overnight; it requires the committed effort of all partners both internal and external to the Canadian Armed Forces to do it and do it right.

The Office of the JAG remains stalwart in its commitment to support the Government of Canada and the Canadian Armed Forces in their efforts to re-build public confidence in the military justice system and to transform the military justice system in necessary and meaningful ways.

*Fiat Justitia*

---

5 Canada, *The Report of the Independent External Comprehensive Review*, by the Hon. Louise Arbour (Ottawa, 2022). [the Independent External Comprehensive Review]

6 Canada, *Interim Recommendations from Independent External Comprehensive Review team*, by the Hon. Louise Arbour (Ottawa, 2021).





# WHO WE ARE: THE OFFICE OF THE JUDGE ADVOCATE GENERAL

## THE JUDGE ADVOCATE GENERAL

In accordance with section 9 of the *National Defence Act*,<sup>1</sup> the Judge Advocate General is appointed by the Governor in Council for a term not exceeding four years and acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law. Pursuant to section 10 of the *National Defence Act*, the Minister of National Defence may authorize any other officer so qualified to act as the Judge Advocate General. The Judge Advocate General also has the statutory mandate to superintend the administration of military justice in the Canadian Armed Forces pursuant to section 9.2 of the *National Defence Act*.<sup>2</sup> The Judge Advocate General is responsible to the Minister of National Defence in the performance of their duties and functions.

**The Judge Advocate General acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law.**

## COMMAND OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the Judge Advocate General (Office of the JAG). The duties of a legal officer posted to a position established within the Office of the JAG are determined by, or under the authority of, the Judge Advocate General and, in respect of the performance of those duties, a legal officer is not subject to the command of an officer who is not a legal officer.<sup>3</sup> This is to ensure that legal officers provide independent legal services. All qualified legal officers serving in the Office of the JAG are members in good standing at the bar of a province or territory.

**The Judge Advocate General has command over all officers and non-commissioned members posted to a position within the Office of the JAG. To ensure the provision of independent legal services, legal officers within the Office of the JAG are not subject to the command of an officer who is not a legal officer.**

1 *National Defence Act*, RSC 1985, c N-5.

2 *Ibid.*

3 Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: DND, 28 June 2019), at art 4.081(4).

# OFFICE OF THE JUDGE ADVOCATE GENERAL

The Office of the JAG supports the Judge Advocate General in carrying out their statutory duties and functions. It is composed of Canadian Armed Forces' Regular and Reserve Force legal officers, civilian members of the Public Service, and Canadian Armed Forces' members from other military occupations.

The Office of the JAG is comprised of six divisions and two directorates, all led by legal officers of the Colonel/Captain(N) rank, and whose legal officer members are drawn from both the Regular Force and the JAG Primary Reserve List. These are the Director of Military Prosecutions, Director of Defence Counsel Services, the Chief of Staff and Corporate Services Division, the Military Justice Division, the Military Justice Modernization Division, the Operational and International Law Division, the Administrative Law Division, and the Regional Services Division.

The Office of the JAG's mission is to deliver client focused, timely, options-oriented, and operationally-driven legal services in support of Government of Canada, Department of National Defence and Canadian Armed Forces priorities and objectives.

During the first half of the reporting period the Office of the JAG initiated an organization change to create a new Division - Military Justice Modernization (MJM) - to enable the Office of the JAG to provide the dedicated legal services required to best support the implementation of the military justice related recommendations found in the *Report of the Third Independent Review Authority to the Minister of National Defence*<sup>4</sup> and the anticipated recommendations of *The Report of the Independent External Comprehensive Review*.<sup>5</sup> As a result, the position of Deputy Judge Advocate General, Strategic was changed to become the Deputy Judge Advocate General, Military Justice Modernization, assuming responsibility for leading the new Military Justice Modernization Division staffed with legal officers transferred from other Office of the JAG Divisions and Directorates.

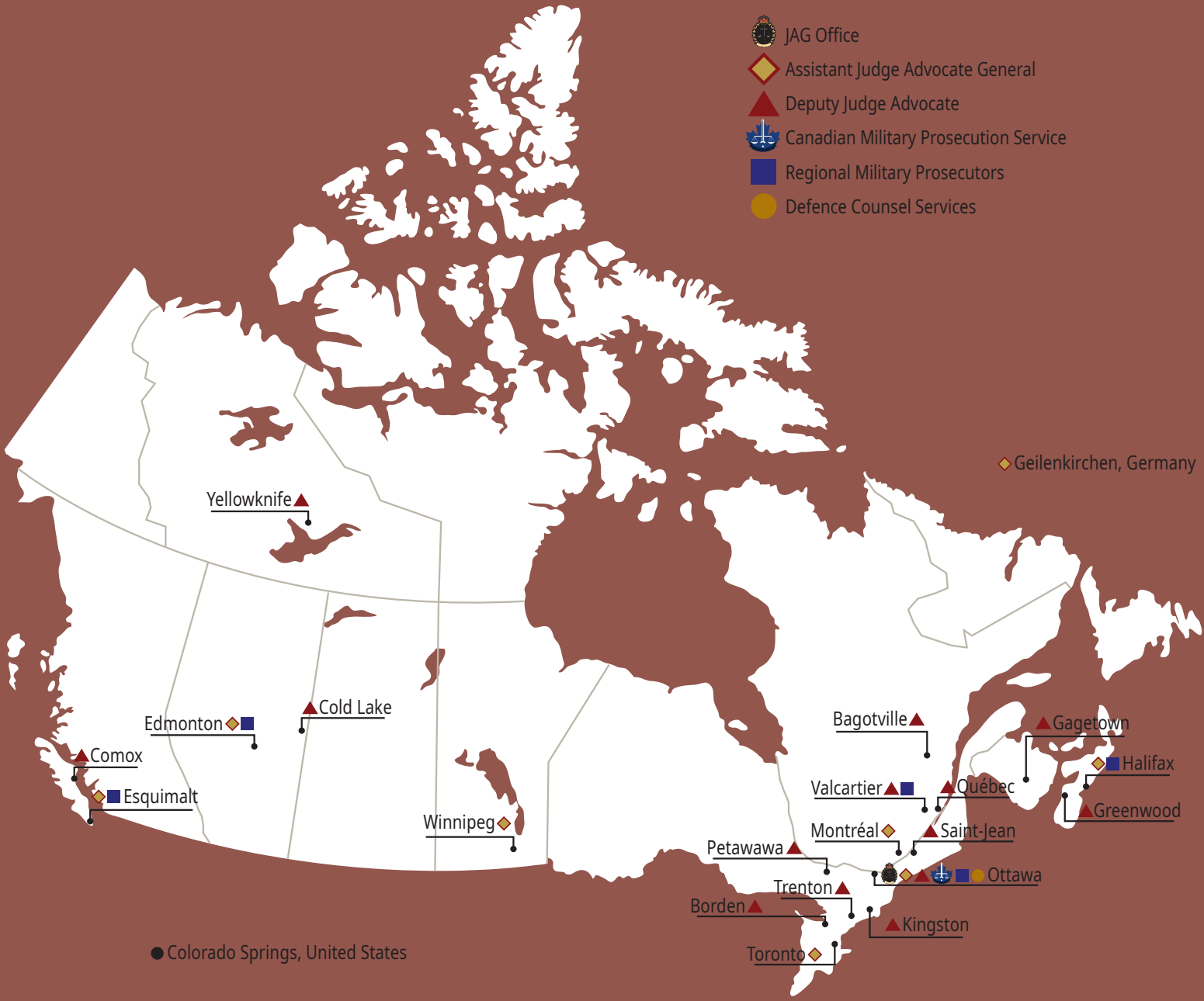
## COMPOSITION

Director of Military Prosecutions  
Director of Defence Counsel Services  
Chief of Staff and Corporate Services Division  
Military Justice Division  
Military Justice Modernization Division  
Operational and International Law Division  
Administrative Law Division  
Regional Services Division

4 Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021). [the Third Independent Review]

5 Canada, *The Report of the Independent External Comprehensive Review*, by the Hon. Louise Arbour (Ottawa, 2022). [the Independent External Comprehensive Review]

FIGURE 1-1: CANADIAN OFFICES OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL



# JUDGE ADVOCATE GENERAL CHIEF WARRANT OFFICER

The Judge Advocate General Chief Warrant Officer serves as the senior non-commissioned member advisor to the Judge Advocate General. Based on the command team concept, the Judge Advocate General Chief Warrant Officer provides perspective to the Judge Advocate General and the senior leadership team on strategic issues related to the Judge Advocate General's statutory roles, the Canadian Armed Forces and the Office of the JAG.

Together with the Canadian Armed Forces Chief Warrant Officer, the Judge Advocate General Chief Warrant Officer co-chairs the Canadian Armed Forces Discipline Advisory Council. This council includes the most senior non-commissioned members from each command and from other key level one organizations. The council meets to discuss strategic issues relevant to the maintenance of

discipline and provides input to both the Armed Forces Council and the Judge Advocate General.

Other experienced Chief Warrant Officers and Chief Petty Officers First Class are posted to positions in the Assistant Judge Advocate General offices and in certain Deputy Judge Advocate offices within Canada. The Assistant Judge Advocate General and Deputy Judge Advocate Chief Warrant Officers/ Chief Petty Officers First Class provide an invaluable link between senior non-commissioned members at the unit, base, wing, and formation levels, and the local legal office in addressing disciplinary and administrative matters.



**During the current reporting period, the Judge Advocate General Chief Warrant Officer has:**

- **Co-chaired the Canadian Armed Forces Discipline Advisory Council**
- **Coordinated and maintained responsibility for all Office of the JAG ceremonial functions in the National Capital Region, including the presentation of the Royal Banner by Her Majesty the Queen**
- **Researched, designed, and sourced a display case for the Office of the JAG Royal Banner**
- **Coordinated the Office of the JAG Honours & Recognitions Boards**
- **Coordinated with all Level 1 Chief Warrant Officers on key files and issues**
- **Participated in numerous Professional Development meetings within the Office of the JAG, and served as a member of the Professional Development Council chaired by Commander Canadian Defence Academy**

**KEY INITIATIVES**

# DIRECTOR OF MILITARY PROSECUTIONS

The Director of Military Prosecutions, the senior military prosecutor in the Canadian Armed Forces, is appointed by the Minister of National Defence for a renewable term of up to four years pursuant to subsections 165.1(1) and (2) of the *National Defence Act*.<sup>6</sup> The Director of Military Prosecutions acts independently from the Canadian Armed Forces and Department of National Defence authorities when exercising their prosecutorial powers, duties, and functions. Only the Minister of National Defence may remove the Director of Military Prosecutions from office, for cause, and only on the recommendation of an independent inquiry committee.

6 *Supra* note 1.

In accordance with section 165.15 of the *National Defence Act*,<sup>7</sup> the Director of Military Prosecutions may be assisted and represented, to the extent determined by the Director of Military Prosecutions, by officers who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Military Prosecutions is assisted by a number of Regular and Reserve Force legal officers, along with a civilian paralegal and support staff. In instances where there is a risk of conflict of interest, the Director of Military Prosecutions may also appoint special prosecutors who are not legal officers but who are Canadian Armed Forces officers and barristers or advocates with standing at the bar of a province or territory. The Canadian Military Prosecution Service is organized regionally with Regional Military Prosecutors located in Halifax, Valcartier, Ottawa, Edmonton, and Esquimalt.

7 *Ibid.*

During the current reporting period, the Canadian Military Prosecution Service has:

- Continued to meet and adapt to the challenges of bringing matters before the courts in the midst of the COVID-19 pandemic
- Implemented the interim recommendation of the Independent External Comprehensive Review by meeting with complainants in over 33 cases concerning offences of a sexual nature
- Attended and participated in Heads of Prosecution meetings with federal, provincial, and territorial partners
- Established with federal, provincial and territorial partners, in an ad hoc working group on concurrent jurisdiction in response to Recommendations 19 and 20 of the Third Independent Review
- Demonstrated a commitment to continual professional development by attending the National Criminal Law Program held in Victoria B.C.
- Acted as counsel and appeared in person at both the Court Martial Appeal Court of Canada and at the Supreme Court of Canada

KEY INITIATIVES

It is the responsibility of the Director of Military Prosecutions, with the assistance of those legal officers appointed to act as military prosecutors, to prefer all charges to be tried by court martial, to conduct all prosecutions at court martial, and to act as counsel for the Minister of National Defence in respect of appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada. The Director of Military Prosecutions is also responsible for providing advice in support of investigations conducted by the Canadian Forces National Investigation Service, a military police service that reports to the Canadian Forces Provost Marshal. The Director of Military Prosecutions also acts as counsel for the Canadian Armed Forces during custody review hearings.

Pursuant to section 165.17 of the *National Defence Act*,<sup>8</sup> the Director of Military Prosecutions acts under the general supervision of the Judge Advocate General and, the Judge Advocate General has the authority to issue general instructions or guidelines in writing to the Director of Military Prosecutions in respect of prosecutions. The Director of Military Prosecutions must ensure that any such instructions or guidelines are made available to the public. The Judge Advocate General also has the authority to issue instructions or guidelines in writing in respect of a particular prosecution. The Director of Military Prosecutions must ensure that these instructions or guidelines are made available to the public unless the Director of Military Prosecutions considers that doing so would not be in the best interest of the administration of military justice. During this reporting period, the Judge Advocate General did not issue any general or specific instructions or guidelines to the Director of Military Prosecutions.

On 1 June 2021, the report of the Third Independent Review was tabled in Parliament. In this report, the Honorable Morris J. Fish made 107 recommendations of which 6 recommendations pertained directly to enhancing the independence of the Director of Military Prosecutions and military prosecutors, as well as the Director of Defence Counsel Services and military defence counsel.<sup>9</sup> On 20 October 2021, during the conduct of the Independent External Comprehensive Review, the Honorable Louise Arbour issued an interim recommendation to the Minister of National Defence to implement recommendation 68 of the Third Independent

Review and to immediately transfer to civilian police forces all cases in the military justice system involving sexual assault and other offences of a sexual nature including allegations that were under investigation by the Canadian Forces National Investigation Service (CFNIS). Additionally, Justice Arbour recommended that in all relevant cases, sexual offence charges be laid in civilian courts. On 5 November 2021, the Canadian Forces Provost Marshal and the Director of Military Prosecutions issued a joint statement indicating their respective acceptance of the interim recommendation.

In accordance with article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*,<sup>10</sup> the Director of Military Prosecutions reports annually to the Judge Advocate General on the execution of their duties and functions. A comprehensive review of the Canadian Military Prosecution Service activities over this reporting period can be found in the Director of Military Prosecutions Annual Report 2021-2022, which is attached as Annex C to this report.

---

8 *Ibid.*

9 *Supra* note 4 at Recommendations, #7, #8, #9, #10, #11, and #12.

10 *Supra* note 3.



# DIRECTOR OF DEFENCE COUNSEL SERVICES

The Director of Defence Counsel Services is appointed by the Minister of National Defence for a renewable term of up to four years pursuant to subsections 249.18(1) and (2) of the *National Defence Act*.<sup>11</sup> The Director of Defence Counsel Services acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising their powers, duties, and functions. Only the Minister of National Defence may remove the Director of Defence Counsel Services from office for cause, and only on the recommendation of an inquiry committee.

In accordance with section 249.21 of the *National Defence Act*,<sup>12</sup> the Director of Defence Counsel Services may be assisted in their duties and functions by persons who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Defence Counsel Services, located in the National Capital Region, is assisted by a number of Regular and Reserve Force legal officers who act as defence counsel, along with a civilian paralegal and support staff.

11 *Supra* note 1.

12 *Ibid.*

In accordance with section 249.19 of the *National Defence Act*,<sup>13</sup> it is the responsibility of the Director of Defence Counsel Services to provide, supervise and direct the legal services available under article 101.11 of the *Queen's Regulations and Orders for the Canadian Forces*<sup>14</sup> to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline, at no cost. This includes, but is not limited to:

- the provision of legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation, or a board of inquiry;
- the provision of legal advice to persons arrested or detained in respect of a service offence;
- the provision of legal counsel to an accused person where there are reasonable grounds to believe that the accused person is unfit to stand trial;
- the provision of legal advice of a general nature to an accused person or assisting officer on matters relating to summary trials;
- the provision of legal counsel to a person in respect of an application to review a direction for the conditional release of the person from custody following arrest;

13 *Ibid.*

14 *Supra* note 3.

## KEY INITIATIVES

During the current reporting period, Defence Counsel Services has:

- Filed applications for leave to appeal at the Supreme Court of Canada in several cases raising the issue of judicial independence of military judges under s.11 (d) of the *Canadian Charter of Rights and Freedoms*
- Represented clients in person at both Courts Martial and at the Court Martial Appeal Court of Canada
- Successfully advocated for leave to appeal to the Supreme Court of Canada in *R v McGregor* on the issue of the extraterritorial application of the *Canadian Charter of Rights and Freedom*

- the provision of legal counsel to a person in respect of pre-trial custody hearings, in situations where the accused person is retained in custody following arrest;
- the provision of legal advice to an accused person with respect to the making of an election to be tried by court martial;
- the provision of legal advice to an accused person with respect to the waiver of the limitation periods;
- the provision of legal counsel to an accused person in respect of whom an application to a referral authority has been made;
- the provision of legal advice to an offender, or to an officer or non-commissioned member appointed to assist an offender, in respect of an application to vary a suspension order or an intermittent sentence order or an application to vary conditions or in respect of a hearing into breach of conditions;
- the provision of legal advice to a person who wishes to preserve the right to appeal under the *National Defence Act*;<sup>15</sup>
- the provision of legal advice to a person who wishes to apply, or has applied, to the Appeal Committee;
- the provision of legal counsel to a person in respect of an application for release pending an appeal;
- the provision of legal counsel to a person released from custody pending appeal, in respect of an application for review or breach of an undertaking or appeal;
- the provision of legal counsel to the respondent on an appeal or an application for leave to appeal by the Minister of National Defence; and
- the provision of legal counsel to an appellant on an appeal or an application for leave to appeal with the approval of the Appeal Committee.

The relationship between the Director of Defence Counsel Services and the Judge Advocate General is set out at section 249.2 of the *National Defence Act*.<sup>16</sup> The Director of Defence Counsel Services acts under the general supervision of the Judge Advocate General, and the Judge Advocate General has the authority to issue general instructions or guidelines in writing to the Director of Defence Counsel Services in respect of defence counsel services. Furthermore, the Director of Defence Counsel Services must ensure that any such instructions or guidelines are made available to the public. Unlike with the Canadian Military Prosecutions Service, the Judge Advocate General has no authority to issue instructions or guidelines in respect of a particular case. During this reporting period, the Judge Advocate General did not issue any general instructions or guidelines to the Director of Defence Counsel Services in respect of defence counsel services.

On 1 June 2021, the report of the Third Independent Review was tabled in Parliament. In this report, the Honorable Morris J. Fish made 107 recommendations of which 6 recommendations pertained to enhancing the independence of the Director of Defence Counsel Services and of military defence counsel, as well as the Director of Military Prosecutions and military prosecutors.<sup>17</sup> Justice Fish acknowledged in his report the important role filled by military defence counsel in providing independent legal services and advocacy on behalf of their clients to ensure the ongoing legitimacy of the military justice system.<sup>18</sup>

In accordance with paragraph 101.11(4) of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Defence Counsel Services is required to report annually to the Judge Advocate General on the provision of legal services as well as other duties that are prescribed by regulations. A copy of the Annual Report 2021-2022, Director of Defence Counsel Services is attached as Annex D to this report.

---

15 *Supra* note 1.

16 *Ibid.*

17 *Supra* note 4 at Recommendations, #7, #8, #9, #10, #11, and #12.

18 *Supra* note 4 at para. 133.

# CHIEF OF STAFF AND CORPORATE SERVICES DIVISION

Composed of both civilian and military staff, the Chief of Staff and Corporate Services Division is responsible for providing the Office of the JAG with staff and corporate services and support across a range of functions, including military personnel and civilian

human resources management, business planning, comptroller and financial management services, information management and technology, military and civilian training, organization and establishment, and administrative support services.

The Division is further responsible for addressing external corporate requirements, and is the Office of the JAG lead on a number of key departmental and governance processes within the Department of National Defence and Canadian Armed Forces including the Business Plan, the Departmental Plan, the

**During the current reporting period, the Chief of Staff and Corporate Services Division has:**

- Continued to lead the Office of the JAG's response to the COVID-19 pandemic through continued implementation of its Business Continuity Plan, by ensuring adequate resources to transition between home and office work, and by supporting morale and welfare initiatives
- Established a business analytics capability within the Office of the JAG to assist performance measurement and to facilitate data driven decision-making
- Generated a supplemental submission to Treasury Board concerning the Office of the JAG Budget for the 21-22 fiscal year
- Supported changes to establish the Military Justice Modernization Division and aligned financial resources to support the completion of independent reviews
- Continued to support the full Office of the JAG transition to the new Performance and Competency Evaluation (PaCE) system for evaluating military personnel performance
- Expanded the Office of the JAG's Primary Reserve List and accelerated legal officer recruiting to address additional legal service demands within the Office of the JAG
- Continued work on the Military Employment Study (MES) final report recommending changes to the organization, establishment, and occupation descriptions for Canadian Armed Forces legal officers
- Supported cyclical Department of National Defence and Canadian Armed Forces programs including Business Planning, the Departmental Results Framework, the Departmental Plan, the Departmental Results Report, the Defence Team Establishment Plan, the Annual Military Occupational Review, postings, and Personnel Evaluation Review management

## KEY INITIATIVES

Departmental Results Framework, the Departmental Results Report, the Defence Team Establishment Plan, the Defence Ethics Program, as well as the development, submission and implementation of Office of the JAG action plans for various programs such as Official Languages, Employment Equity Diversity and Inclusion, and the Public Service Employment Survey. The Division also provides support to the Chief of Staff for some administrative and command functions for the Office of the JAG relative to personnel, acts as principal advisor to the JAG on administrative and corporate matters, and as the Legal Branch Advisor, working with Military Personnel Command staff in the recruitment, training, career management, professional development, and succession planning of Canadian Armed Forces legal officers.

The Legal Branch Advisor, together with the Military Personnel Command, has commenced implementation of a report generated because of a multi-year military employment structure study of the legal officer occupation. Led by a legal officer posted to the Director Personnel Generation Requirements, the study analyzed all legal officer work requirements including jobs, positions, occupation structures, and employment

qualifications. Among other issues, the study analyzed the possible specialization of military justice litigators along with other changes to legal officer employment that could enhance the independence of key actors in the military justice system. Implementation of the report's recommendations is expected to drive important changes in future legal officer training, employment, and career progression.

Finally, the Division serves as the locus of Office of the JAG efforts to work with the broader Defence Team to align personnel and financial resources to achieve Department of National Defence, Canadian Armed Forces and Judge Advocate General priorities. During this reporting period, these efforts included ad hoc requests for "total force" growth to Regular Force, Reserve Force, and civilian components of the Office of the JAG establishment and the preliminary analysis of options to reorient and reorganize the Office to enable the timely analysis and implementation of the forthcoming recommendations of independent reviews impacting the military justice system.



# MILITARY JUSTICE DIVISION

The Military Justice Division is responsible for supporting the Judge Advocate General in the fulfillment of their statutory responsibility as the superintendent of the administration of military justice in the Canadian Armed Forces and enabling its necessary evolution. Additionally, the Division is responsible for providing legal support to the Canadian Forces Provost Marshal. During the reporting period, the Division experienced

a significant re-organization. Specifically, the Judge Advocate General Independent Review Response Team, which was responsible for supporting the Third Independent Review, was transferred to the newly constituted Military Justice Modernization Division. This transfer took place shortly after the report of the Third Independent Review was tabled in Parliament on 1 June 2021 and it was renamed the Directorate of Law/ Military Justice Review Support. Additionally, the Directorate of Law/ Military Justice Operations was sub-divided, and a new directorate entitled Directorate of Law/ Military Justice Superintendence was created.

**During the current reporting period, the Military Justice Division has:**

- **In collaboration with our partners, developed and achieved approval of the regulations required to enable the implementation of Bill C-77: *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts***
- **Continued to implement the recommendations stemming from Office of the Auditor General of Canada and Parliamentary reviews pertaining to the administration of justice in the Canadian Armed Forces**
- **Worked in partnership with the Assistant Deputy Minister (Information Management) in the ongoing development of the software and supported the rollout of JAIMS to units from 2 Canadian Mechanized Brigade Group in Petawawa (including the 2 CMBG Headquarters – making it the first formation in the CAF to have access to the JAIMS), as well as units belonging to Maritime Forces Pacific in Esquimalt and 2 Canadian Air Division in Winnipeg and Dundurn. This brought the total number of units using JAIMS to 18**
- **Enabled strategic military justice exchanges through the Military Justice Stakeholders Forum**
- **Provided legal services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group**

## KEY INITIATIVES

Following the re-organization, the Military Justice Division comprised four directorates - each being responsible to support the Judge Advocate General's mandate in critical ways.

The Directorate of Law/ Military Justice Policy has responsibility for policy development in the area of military justice, the development of legislation, regulations, orders and directives that pertain to the military justice system, the provision of advice on issues related to military justice policies, and the development of publications and guides related to the military justice system.

The Directorate of Law/ Military Justice Operations has responsibility for providing direct, support to the Judge Advocate General in relation to superintendence of the day-to-day operations of the military justice system. This includes providing direct operational support to legal officers within the Office of the JAG on military justice issues, producing the Judge Advocate General's annual report to the Minister of National Defence, and managing the Military Justice Tracking System.

The Directorate of Law/ Military Justice Superintendence is responsible for the Superintendence Enhancement and Assessment Project. As such, Military Justice Superintendence works in partnership with the Assistant Deputy Minister (Information Management) to develop the Justice Administration and Information Management System (JAIMS). Military Justice Superintendence is also responsible for developing the Performance Monitoring Framework, maintaining the Military Justice System Time Standards and conducting the Military Justice System Stakeholder Engagement Project Survey.

The Canadian Forces Provost Marshal Legal Advisor is responsible for providing legal support and services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group. This Directorate enables the efficient, effective and lawful conduct of policing operations, investigations, custody, and mandated security tasks. In addition, it also acts as the principal liaison between the Office of the JAG and the Canadian Forces Provost Marshal.



# MILITARY JUSTICE MODERNIZATION DIVISION

The Military Justice Modernization Division is responsible for supporting the Judge Advocate General in fulfilling their statutory responsibilities in respect of the superintendence of the administration of military justice in the Canadian Armed Forces. More specifically,

the Division is responsible for enabling the Office of the JAG's efforts to support the conduct of independent and external reviews and the implementation of their resulting military justice-related recommendations in a manner consistent with direction received from the Minister of National Defence.

The Military Justice Modernization Division delivers its services through two distinct directorates: the Directorate of Law/ Military Justice Implementation and the Directorate of Law/ Military Justice Review Support.

**During the current reporting period, the Military Justice Modernization Division has:**

- **Provided critical input to the drafting of the CDS/DM Initiating Directive to stand up the External Comprehensive Reviews Implementation Committee (ECRIC) governance structure, and drafted the related JAG Initiating Directive to provide for the OJAG response to external comprehensive reviews**
- **Undertaken detailed analysis of the Third Independent Review and begun working towards implementation of those recommendations related to military justice for which the JAG is primarily or jointly responsible, with a focus on 36 recommendations identified by the MND for which work should begin in the short term**
- **Initiated the stand-up of working groups with independent actors and other government departments to advance the implementation of critical Third Independent Review recommendations, such as those pertaining to the creation of a permanent military court**
- **Provided advice to support the work of the ECRIC and Director General External Reviews Implementation Secretariat (DGERIS)**
- **Facilitated engagement of key military justice stakeholders both within and external to the DND/CAF, including through participation in Federal/Provincial/Territorial conferences**
- **Supported Parliamentary committee appearances of representatives of the Office of the JAG.**

## KEY INITIATIVES

The Directorate of Law/ Military Justice Implementation is responsible for assisting the Department of National Defence, the Canadian Armed Forces, and the Office of the JAG with the implementation of recommendations from the Third Independent Review and the Independent External Comprehensive Review. Military Justice Implementation also provides support to the Judge Advocate General as part of their efforts to implement the recommendations for which the Office of the JAG is primarily or jointly responsible. The Third Independent Review and its contents are discussed in greater detail in Chapter 4.

Directorate of Law/ Military Justice Review Support is responsible for assisting the Canadian Armed Forces and the Office of the JAG to support the work of the Independent External Comprehensive Review. During this reporting period, Military Justice Review Support provided support to the Independent External Comprehensive Review as follows: by meeting with Justice Arbour's team as required; by responding directly to specific requests for information or assistance related to military justice; by facilitating other requests for information and assistance that need to be addressed by a different Office of Primary Interest; and, by supporting the implementation of interim recommendations made by Justice Arbour as interim recommendations are released. The Independent External Comprehensive Review is discussed in greater detail in Chapter 4.





# OPERATIONAL AND INTERNATIONAL LAW DIVISION

The Operational and International Law Division is responsible for the provision of military legal services for all domestic and international operations. Additionally, this Division oversees all legal officers deployed on operations. Deployed legal officers provide legal support to deployed Canadian Armed Forces elements on all aspects of military law, including the military justice system.

During the current reporting period, the Operational and International Law Division has:

- Supported the Canadian delegation at the United Nations Open-Ended Working Group on Security of and in the use of Information and Communications Technologies
- Continued to provide legal advice and support for over 20 domestic operations in support of the whole-of-Government response to the COVID-19 pandemic, natural disasters and humanitarian assistance
- Provided legal advice and support to over 20 Canadian Armed Forces operations around the world
- Supported Canadian Armed Forces with respect to vaccination exemption requests
- Supported the Department of National Defence and Canadian Armed Forces in providing responses to nearly a dozen national security or intelligence reviews
- Provided legal advice and support in relation to the provision of military assistance to Ukraine, in anticipation of an international armed conflict between Russia and Ukraine
- Planned the development and publication of Canada's National Statement on "International Law applicable in cyberspace"
- Commenced a legal analysis of the DND/CAF human intelligence capabilities, focusing on whether this specialized activity is conducted in compliance with the law, directives, and policy
- Provided ongoing legal advice and support in relation to the release by the Government of Canada of its first voluntary report on the domestic implementation of international humanitarian law, in accordance with a commitment of Canada at the G7 on promoting IHL implementation and achieve greater awareness of and respect for IHL among national and international partners.

## KEY INITIATIVES

The Operational and International Law Division is made up of eight directorates: the Strategic Joint Staff Legal Advisor; the Directorate of Law – International; the Canadian Joint Operations Command Legal Advisor; the Canadian Special Operations Forces Command Legal Advisor; the Legal Advisor to the Canadian Component at the North American Aerospace Defense Command; the Directorate of Law - Intelligence and Information Operations; the Directorate of Law – Cyber Operations; and newly established this reporting period, the Directorate of Law - National Security and Intelligence Review and Oversight.

The Strategic Joint Staff Legal Advisor provides legal advice on all strategic level operational issues affecting Canadian Armed Forces operations around the world such as domestic and international legal authorities, rules of engagement and use of force.

The Directorate of Law/ International provides strategic legal support and advice on the international legal framework for Canadian Armed Forces activities. This includes advice on the international legal basis for the conduct of operations, and in areas such as the law of armed conflict, international human rights law, and international criminal law. As well, this Directorate is the principal liaison with Global Affairs Canada Legal Services. This Directorate also works closely with partners and allies as well as Non-Governmental Organizations like the Canadian Red Cross and the International Committee of the Red Cross.

The Canadian Joint Operations Command Legal Advisor provides legal advice to the Commander of Canadian Joint Operations Command on all military law matters related to the conduct of conventional military operations at the operational level, in both continental and expeditionary contexts. In addition, deployed legal officers report to the Canadian Joint Operations Command Legal Advisor.

During this reporting period, 13 legal officers were deployed in direct support of four overseas operations: Operation REASSURANCE, Operation ARTEMIS, Operation IMPACT, as well as to the NATO Mission in Iraq. Deployed legal officers provide close support to task force commanders and staff to help ensure that missions are conducted in accordance with the applicable law.

The Canadian Special Operations Forces Command Legal Advisor provides legal advice in all aspects of military law related to the conduct of Canadian Special Operations Forces Command operations including its domestic and international counter-terrorism response and its mandated response to all domestic and international terrorist attacks, international crises, and associated threats.

The Legal Advisor to the Canadian component at North American Aerospace Defence Command provides legal advice on national issues to the Deputy Commander of North American Aerospace Defence in their role as the senior Canadian officer in the bi-national command structure. In addition, they provide advice on North American Aerospace Defence issues generally as part of the overall legal services team for North American Aerospace Defence Command.

The Directorate of Law/ Intelligence and Information Operations is the primary legal advisor to Canadian Forces Intelligence Command / Chief of Defence Intelligence and the units and organizations that report to them. It provides legal advice on strategic, operational, and tactical level issues relating to both domestic and international matters of an intelligence nature. Key areas of legal advice include information sharing, open-source intelligence, and counter-intelligence investigations.

The Directorate of Law/ Cyber Operations provides legal support at the strategic, operational, and tactical level on issues relating to the development and employment of cyber capabilities. This Directorate works closely with other Government of Canada departments and agencies as well as partners and Allies on issues of military law related to Canada's activities in cyberspace.

The Directorate of Law/ National Security and Intelligence Review and Oversight was stood up during this reporting period. This new Directorate provides legal support to the National Security and Intelligence Review and Oversight Coordination Secretariat on questions of law related to the National Security and Intelligence Committee of Parliamentarians and the National Security and Intelligence Review Agency (NSIRA).

# ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal advice to Canadian Armed Forces leaders at the strategic level on matters pertaining to the administration of the Canadian Armed Forces. This includes military personnel policies, administrative investigations, compensation, benefits, pensions, and estates, as well as matters relating to the governance, organization, and command structure of the Canadian Armed Forces and the operation of the military grievance system. Given the size and complexity of the Canadian Armed Forces and the multitude of important administrative decisions made each day, one of the objectives of providing legal advice in the military administrative law realm is to ensure that these decisions are made in accordance with applicable law and policy.

The Administrative Law Division is composed of three directorates: Directorate of Law/ Military Personnel; Directorate of Law/ Administrative Law; and Directorate of Law/ Compensation, Benefits, Pensions and Estates. Additionally, the Administrative Law Division is responsible for the legal advisor assigned to provide legal support to the Office of the Chief of the Defence Staff. The Directorate of Law/ Military Personnel provides legal advice on the development and application of personnel policies spanning from recruitment to release, including such topics as universality of service, culture change, and conduct deficiencies.

The Directorate of Law/ Administrative Law provides legal advice and support in relation to complaint and conflict management, including military grievances, grievance-related litigation, administrative investigations, and the Canadian Armed Forces organization and command structure.

The Directorate of Law/ Compensation, Benefits, Pensions and Estates provides legal advice and support on the full spectrum of this framework, as well as legal and administrative support in relation to Service Estates.

## KEY INITIATIVES

During this reporting period, the Administrative Law Division has supported:

- The Chief Professional Conduct and Culture in initiating culture change
- The Chief of Military Personnel in developing military personnel policy (e.g., remote work)
- The Canadian Armed Forces in implementing mandatory COVID-19 vaccination
- Those responsible for proposing modifications to a substantial number of Compensation and Benefits Instructions, as well as those administering the grievance system and boards of inquiry
- The Chief of Defence Staff Office

# REGIONAL SERVICES DIVISION

Regional Services is the largest Division within the Office of the JAG and delivers legal services principally to Canadian Armed Forces' units across Canada and abroad. There are eight regions within Regional

Services, each of which is led by an Assistant Judge Advocate General (AJAG). The AJAG offices are located in: Ottawa, Halifax, Montreal, Toronto, Winnipeg, Edmonton, Esquimalt, and Geilenkirchen (Germany). Additionally, there are several legal officers who hold the position of Deputy Judge Advocate (DJA) and work directly for their respective AJAGs but are situated in satellite DJA offices located across Canada, typically in more remote areas.

**During this reporting period, legal officers from the Regional Services Division have:**

- **Advised on all aspects of military justice at the unit level**
- **Responded to high demands in all areas of military law, supporting over 1400 discipline cases, approximately 37 Boards of Inquiry, and many other issues including the provision of advice on strategic policies, high profile grievances, and removal from command**
- **Provided critical advice on the application of the North Atlantic Treaty Organization Status of Forces Agreement and other related agreements**
- **Supported operations in the Arctic, including support to northern communities and Operation NANOOK (defence and security of Canada's North)**
- **Supported Canadian NORAD region operations and exercises**
- **Provided direct support to domestic operations such as Operation LENTUS (assistance during floods, fires, and natural disasters), Operation LASER (response to the COVID-19 pandemic), Operation VECTOR (support to the Federal, Provincial, and Territorial government for the distribution of COVID-19 vaccines), Search and Rescue, and Assistance to Law Enforcement Agencies**
- **Supported force generation by participating in numerous exercises designed to ensure the operational readiness of the CAF**
- **Prepared for seamless transition for coming into force of Bill C-77 regulations in the first quarter of the next FY**

## KEY INITIATIVES

The Regional Services Division is composed of both Regular and Reserve Force legal officers, all of whom provide legal advice to both Regular and Reserve Force commands, formations, and units on various aspects of military law. One of those aspects is military justice, which captures unit level advice on all aspects of the charge laying process. Legal officers within the Regional Services Division also assisted Referral Authorities in their duties to outline public interest factors or a lack of those factors when submitting files to the Director of Military Prosecutions for potential trials by way of court martial. Additionally, legal officers provide advice on all aspects of summary trials, thereby enhancing the fairness of such hearings and ensuring that the summary trial process is conducted in accordance with the law.

Another key aspect of the duties of the legal officers within the Regional Services Division is to provide training to Canadian Armed Forces commands, formations, and units. Examples of the variety of training topics include but is not limited to unit disciplinary investigations, the law of armed conflict, the use of force, and administrative legal issues. In support of the Judge Advocate General's role as superintendent of the administration of military justice, legal officers within the Regional Services Division supported the last Presiding Officer Certification Training sessions prior to the coming into force of Bill C-77 with 31 two-day courses

completed, six of which were delivered in French, with approximately 994 candidates completing the course. Regional Services also conducted 149 Unit Disciplinary Investigation courses in this reporting period.

In anticipation of the impending regulatory amendments that would come into force at the same time as Bill C-77 related amendments to the *National Defence Act*, a working group - the C-77 Regional Services Working Group was created in fall 2021. The C-77 Working Group met regularly with the C-77 Canadian Armed Forces Secretariat that is discussed in greater detail in Chapter 4, to prepare the Regional Services Division for the coming into force of the new regulations and for a seamless transition when offering legal services to their clients.

The Regional Services Division is the principal source of generating legal officers for Canadian Armed Forces exercises, training, and operational deployments in Canada and abroad. In this reporting period, legal officers from Regional Services provided support to domestic operations including Operations LENTUS, NANOOK-NUNALIVUT, LASER and VECTOR. Regional Services members also deployed internationally as part of Operations IMPACT, UNION, REASSURANCE, and the NATO Mission in Iraq. They participated in 17 exercises, including Ex RIMPAC 2022 and MAPLE RESOLVE.



# DEPUTY JUDGE ADVOCATE GENERAL RESERVES

The Deputy Judge Advocate General Reserves is a member of the Office of the JAG Senior Council. They provide critical advice to the Judge Advocate General and Office of the JAG senior leadership in matters of Primary Reserve policy and employment in relation to Reserve Force legal officers.

Reserve Force Legal Officers provide tactical legal support to Canadian Armed Forces reserve elements, offer unique legal skills, and provide a surge capacity to complete tasks which exceed the Office of the JAG's regular force capacity. Primary Reserve List members are located throughout Canada and principally support the Regional Services Division, the Canadian Military Prosecution Service, and Defence Counsel Services. Reserve Force legal officers undergo the same training and development as their Regular Force counterparts to ensure the readiness and capacity of the Office of the JAG to support the full range of Canadian Armed Forces operations. Primary Reserve List members in regional services maintain personal readiness and may voluntarily deploy on domestic and international operations.

## KEY INITIATIVES

During the current reporting period, Primary Reserve List members have:

- Worked on special assignments with the Military Justice Division and Canadian Forces Military Law Centre supporting the implementation of C-77
- Provided advice to Reserve and Regular Force units through regional services offices
- Supported the development and roll out of JAIMS
- Supported the initiatives of the Office of the JAG as well as the full range of Canadian Armed Forces operations

## LEGAL OFFICERS SERVING OUTSIDE THE OFFICE OF THE JUDGE ADVOCATE GENERAL

In addition to the legal officers serving in the above-mentioned organizations, a number of legal officers serve outside the Office of the JAG. Legal officers during this reporting period were employed at the Privy Council Office, Global Affairs Canada, the Canadian Forces Military Law Centre, and the Department of National Defence/ Canadian Armed Forces Legal Advisor with the Department of Justice.

## CIVILIAN PERSONNEL OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Civilian personnel form an integral and essential part of the Office of the JAG and contribute greatly to its continued success. They occupy positions located throughout Canadian Armed Forces bases and wings in Canada and abroad to provide key support to legal officers and their non-legal military personnel through their work in administrative, analytical, and technical tasks.







# THE CANADIAN MILITARY JUSTICE SYSTEM: STRUCTURE AND STATISTICS

## CANADA'S MILITARY JUSTICE SYSTEM

Canada's military justice system operates in parallel with its civilian criminal justice counterpart and forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian criminal justice system, and it is subject to the same constitutional framework, including the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> On several occasions, the Supreme Court of Canada has affirmed the requirement for a separate, distinct military justice system to meet the specific needs of the Canadian Armed Forces<sup>2</sup> and has recognized the military justice system as a “full partner in administering justice alongside the civilian justice system.”<sup>3</sup>

The military justice system is designed to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency, and morale, while ensuring that justice is administered fairly and with respect to the rule of law.

**In *R v Stillman*, 2019 SCC 40 (at para 20) the Supreme Court of Canada recognized that the military justice system is a “full partner in administering justice alongside the civilian justice system.”**

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

2 *R v Généreux*, [1992] 1 SCR 259; *Mackay v R*, [1980] 2 SCR 370; *R v Moriarity*, 2015 SCC 55.

3 *R v Stillman*, 2019 SCC 40 at para 20.

# THE STRUCTURE OF THE MILITARY JUSTICE SYSTEM

## The Code of Service Discipline

The Code of Service Discipline, which is contained in Part III of the *National Defence Act*,<sup>4</sup> is “[t]he foundation of Canada’s military justice system.”<sup>5</sup> It is “an essential ingredient of service life”<sup>6</sup> that “defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard.”<sup>7</sup> The Code of Service Discipline’s purpose is amplified by the *National Defence Act* which is to maintain the discipline, efficiency and morale of the Canadian Armed Forces<sup>8</sup> and it “serves a public function as well by punishing specific conduct which threatens public order and welfare.”<sup>9</sup> It also sets out the procedures and organization of service tribunals, the jurisdiction of various actors in the military justice system, the powers of punishment, and the post-trial review and appeal mechanisms.

The term “service offence” is defined in the *National Defence Act* as “an offence under this Act, the *Criminal Code*, or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.”<sup>10</sup> Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command,<sup>11</sup> absence without leave,<sup>12</sup> and conduct to the prejudice of good order and

discipline,<sup>13</sup> as well as the more conventional offences such as those found in the *Criminal Code*<sup>14</sup> and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are subject to the Code of Service Discipline everywhere and at all times, whereas members of the Reserve Force are subject to the Code of Service Discipline only in the circumstances specified by section 60 of the *National Defence Act*.

## THE TWO TIERS OF THE MILITARY JUSTICE SYSTEM

During the reporting period, the military justice system had a tiered tribunal structure comprised of two types of service tribunals: summary trials and courts martial. The *Queen’s Regulations and Orders for the Canadian Forces*<sup>15</sup> outline procedures for the disposal of a charge by each type of service tribunal.

The following sections describe the two tiers of the military justice system. However, with the implementation of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*,<sup>16</sup> the summary trial process will become a non-penal, non-criminal summary hearing process designed to address minor breaches of military discipline at the unit level. With this reform, courts martial alone will have jurisdiction to decide service offences. A more detailed description of the work undertaken during the reporting period to enable the implementation of Bill C-77 can be found in Chapter 4.

**“The military justice system is...designed to meet the unique needs of the military with respect to discipline, efficiency, and morale...[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.” *R v Stillman*, 2019 SCC 40 (at para 36).**

4 *National Defence Act*, RSC 1985, c N-5.

5 *R v Stillman*, *supra* note 3 at para 55.

6 *MacKay v R*, *supra* note 2 at 398.

7 *R v Généreux*, *supra* note 2 at 297.

8 *National Defence Act*, *supra* note 4 at s 55.

9 *R v Stillman*, *supra* note 3 at para 55.

10 *National Defence Act*, *supra* note 4 at s 2.

11 *Ibid*, s 83.

12 *Ibid*, s 90.

13 *Ibid*, s 129.

14 *Criminal Code*, RSC 1985, c C-46.

15 Canada, Department of National Defence, *Queen’s Regulations and Orders for the Canadian Forces* (Ottawa: DND, 28 June 2019).

16 Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (royal assent 21 June 2019) [Bill C-77].

## Summary Trials

The summary trial is the most commonly used form of service tribunal. It allows for relatively minor breaches of discipline to be tried and disposed of quickly at the unit level. Summary trials are presided over by commanding officers or their delegates, who are trained and certified by the Judge Advocate General as qualified to perform their duties as presiding officers in the administration of the Code of Service Discipline.<sup>17</sup> All accused members are entitled to be assigned an assisting officer who will aid the accused member in the preparation of their case, during the summary trial,<sup>18</sup> and in the preparation of any post-trial request for review.<sup>19</sup> “The procedures [at summary trial] are straightforward and the powers of punishment limited in scope.”<sup>20</sup> This limitation reflects both the relatively minor nature of the offences involved, and the intent that the punishments be primarily corrective in nature.

The jurisdiction at summary trial is limited by factors such as the rank of the accused and the offence or offences charged. All service offences may be tried by court martial, and while some offences must be tried by court martial, those listed in article 108.07 of the *Queen's Regulations and Orders for the Canadian Forces* may also

be tried by summary trial. Military judges<sup>21</sup> and other officers at or above the rank of colonel,<sup>22</sup> can only be tried by courts martial.

For the majority of offences that can be dealt with by summary trial, the accused member will have the right to elect a trial by court martial.<sup>23</sup> The election process has been designed to provide the accused member with the opportunity to make an informed choice regarding the type of service tribunal that will try the matter.

Charges laid under the Code of Service Discipline must be dealt with as expeditiously as the circumstances permit.<sup>24</sup> Unless the accused member waives the limitation periods, they may not be tried by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed, and the summary trial commences within one year after that day.<sup>25</sup>

17 *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 15, art 101.07.

18 *Ibid*, art 108.14.

19 *Ibid*, art 108.45(18).

20 *R v Stillman*, *supra* note 3 at para 62.

21 *National Defence Act*, *supra* note 4, s 164(1.3).

22 *Ibid*, s 164(1)(a).

23 An accused does not have the right to elect his or her mode of trial in two instances. First in cases provided for by article 108.17(1) of the *Queen's Regulations and Orders for the Canadian Forces*, second where the charges are more serious in nature and require a direct referral to court martial.

24 *National Defence Act*, *supra* note 4, s 162.

25 *Ibid*, ss 163(1.1), 164(1.1). Pursuant to the *National Defence Act*, *supra* note 4 at 69(2), “if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, then that limitation period applies.”

## SUMMARY TRIALS

- Most commonly used form of service tribunal
- Designed to quickly and efficiently try minor service offences at the unit level
- Presided over by members of the chain of command
- Accused persons are entitled to an assisting officer throughout the process
- Except in certain circumstances, accused persons have the right to elect to be tried by court martial or summary trial
- A person found guilty at summary trial has the right to apply for a review of the finding, the sentence imposed, or both

## Review of a Finding Made and/or Sentence Imposed at Summary Trial

A member of the Canadian Armed Forces found guilty of a service offence at summary trial has the right to request that a review authority review the finding rendered, the punishment imposed, or both.<sup>26</sup> A review authority may also, on their own initiative, undertake a review of the finding and/or punishment.<sup>27</sup> As provided for under articles 108.45 and 116.02 of the *Queen's Regulations and Orders for the Canadian Forces*, a review authority is typically a more senior officer in the chain of command of the officer who presided over the summary trial. A review authority may quash any findings of guilty made at summary trial, substitute any finding of guilty or punishment, or may mitigate, commute or remit any punishment imposed at summary trial.<sup>28</sup> Before making any determination, a review authority must obtain legal advice.<sup>29</sup>

## Courts Martial

A court martial is a formal military court presided over by a military judge who possesses all of the constitutional hallmarks of independence. It is designed to deal with more serious offences and has powers of punishment up to and including imprisonment for life. Courts martial are conducted in accordance with rules and procedures similar to those of civilian criminal courts, while taking into account the unique requirements of the military justice system. Courts martial exercise the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all “matters necessary or proper for the due exercise of [their] jurisdiction.”<sup>30</sup>

Courts martial, like summary trials, may take place anywhere in Canada and abroad. The *National Defence Act* provides for two types of courts martial: General and Standing. The General Court Martial is composed of a military judge and a panel of five Canadian Armed Forces members. The panel serves as the trier of fact and decides on any finding of guilt. In the event of a guilty finding, it is the military judge who determines the sentence or directs that the offender be discharged absolutely. At a Standing Court Martial, the military judge sits alone, makes any required findings and, if the accused person is found guilty, imposes the sentence or directs that the individual be discharged absolutely.

At court martial, the prosecution is conducted by a military prosecutor under the authority of the Director of Military Prosecutions. The accused is entitled to be represented by defence counsel assigned by the Director of Defence Counsel Services at no cost or by civilian counsel at their own expense.<sup>31</sup>



26 *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 15, art 108.45(1).

27 *Ibid*, art 116.02.

28 *Ibid*, art 108.45 Note B.

29 *Ibid*, art 108.45(8).

30 *National Defence Act*, *supra* note 4, s 179.

31 In some cases, civilian counsel can be provided at no cost by the Director of Defence Counsel Services.

## Appeal of a Court Martial Decision

Decisions made at court martial may be appealed to the Court Martial Appeal Court of Canada.<sup>32</sup> The Court Martial Appeal Court of Canada is composed of civilian judges who are appointed by the Governor in Council from the Federal Court of Appeal, the Federal Court, or from the superior courts and courts of appeal of the provinces and territories. Court Martial Appeal Court of Canada decisions may be appealed to the Supreme Court of Canada on any question of law on which a judge of the Court Martial Appeal Court of Canada dissents, or on any question of law when leave to appeal is granted by the Supreme Court of Canada.

<sup>32</sup> The Minister of National Defence has instructed the Director of Military Prosecutions to act on their behalf for appeals to the Court Martial Appeal Court and the Supreme Court of Canada, pursuant to s 165.11 of the *National Defence Act*.

## COURTS MARTIAL

- **Formal proceedings presided over by a military judge. Military judges are appointed by the Governor in Council, similarly to their civilian counterparts**
- **Designed to deal with more serious offences**
- **There are two types of courts martial: 1) Standing Court Martial presided over by a military judge alone; and 2) General Court Martial presided over by a military judge and a panel composed of five Canadian Armed Forces members, who serve as the triers of fact and decide unanimously on any finding**
- **For both Standing and General courts martial, the military judge determines the sentence**
- **Accused persons have the right to be represented by counsel from Defence Counsel Services at no cost, or by civilian counsel at their own expense. In some cases, civilian counsel can be provided at no cost by Defence Counsel Services**
- **A person found guilty at court martial has the right to appeal to the Court Martial Appeal Court of Canada, and thereafter to the Supreme Court of Canada**

# STATISTICS

The statistics provided in this chapter reflect the quantitative data collected on the military justice system over the 2021/22 reporting period. This reporting period marks the second full reporting period affected by the COVID-19 pandemic. During the last reporting period it was noted that there was a significant decrease in the number of summary trials and courts martial. It is reasonably likely that this decrease can be attributed to the measures taken by the Department of National Defence and the Canadian Armed Forces to protect the health and well-being of its members and prevent the spread of the virus such as: limiting the number of personnel in the workplace; restricting social gatherings; and transitioning from in person to online training. This reporting period saw the easing of some of these measures and a corresponding increase in the number of both summary trials and courts martial. Overall, as compared to the last reporting period, the number of summary trials increased by approximately 35% and courts martial increased by approximately 29%.

## Summary Trials

### NUMBER OF SUMMARY TRIALS

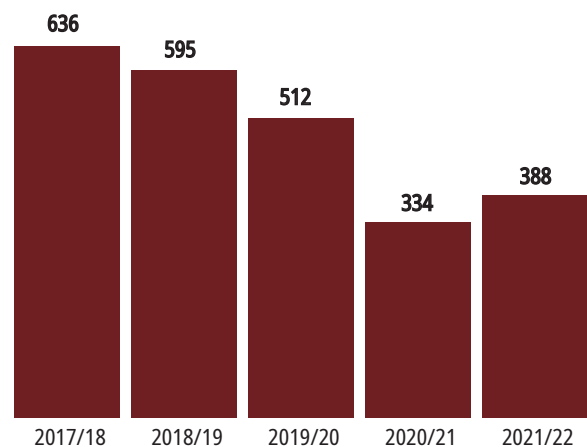
During this reporting period, **388** summary trials and **48** courts martial were conducted. Summary trials comprised **89%** of service tribunals held during the reporting period. Summary trials continued to be the most widely used form of service tribunal in the Canadian Armed Forces.

Figure 2-1 shows the number of summary trials and courts martial held over the last two reporting periods as well as the corresponding percentage of cases tried by each type of service tribunal. Figure 2-2 shows the total number of summary trials by reporting period since 2017/18.

**FIGURE 2-1 :  
DISTRIBUTION OF SERVICE TRIBUNALS**

	2020-2021 <sup>33</sup>		2021-2022	
	#	%	#	%
Number of Courts Martial	34	9.24	48	11
Number of Summary Trials	334	90.76	388	89
<b>Total</b>	<b>368</b>	<b>100</b>	<b>436</b>	<b>100</b>

**FIGURE 2-2:  
NUMBER OF SUMMARY TRIALS<sup>33</sup>**



<sup>33</sup> Summary trial statistics from the 2021/22 reporting period may differ from those statistics in the 2020/21 Annual Report of the Judge Advocate General as a result of late reporting by various units across the Canadian Armed Forces.

**FIGURE 2-3:**  
NUMBER OF SUMMARY TRIALS BY ORGANIZATION

	2020-2021		2021-2022	
	#	%	#	%
Canadian Army	158	47.30	196	50.52
Royal Canadian Navy	61	18.26	48	12.37
Chief of Military Personnel	22	6.59	42	10.82
Royal Canadian Air Force	49	14.67	56	14.43
Canada Joint Operations Command	28	8.38	30	7.73
Canada Special Operations Forces Command	7	2.10	10	2.58
Vice Chief of Defence Staff	5	1.50	5	1.29
Assistant Deputy Minister (Information Management)	1	0.30	1	0.26
Assistant Deputy Minister (Infrastructure and Environment)	2	0.60	0	0.00
Canadian Forces Intelligence Command	1	0.30	0	0.00
<b>Total</b>	<b>334</b>	<b>100</b>	<b>388</b>	<b>100</b>

Figure 2-3 shows the total number of summary trials held over the last two reporting periods by organization. Figure 2-4 specifically illustrates the number of summary trials held since the 2017/18 reporting period within the following five commands: the Canadian Army, the Royal Canadian Navy, the Royal Canadian Air Force, Military Personnel Command, and the Canadian Joint Operations Command.

In this reporting period, the Canadian Army held a total of 196 summary trials as compared to 158 in the previous reporting period. This is an increase of 38 summary trials, or approximately 24%.

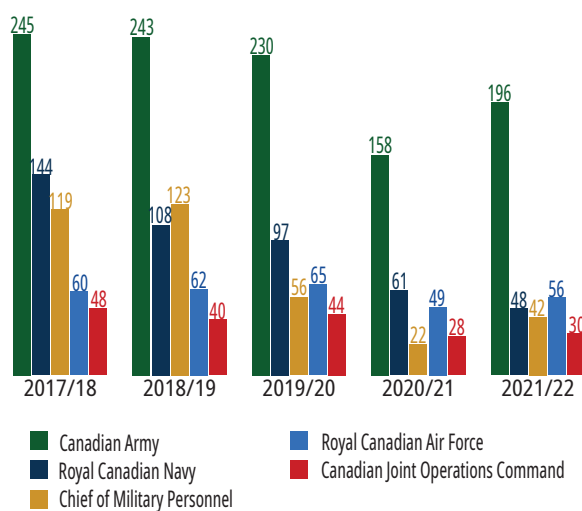
Since 2017/18, the Royal Canadian Navy has seen a steady decrease in summary trials. During this reporting period, there were a total of 48 summary trials, as compared to 61 in the previous reporting period. This is a decrease of approximately 21%.

The Royal Canadian Air Force conducted 56 summary trials in this reporting period, which is an increase of 12% from the 49 held during the last reporting period.

In this reporting period, 42 summary trials were conducted within the Military Personnel Command, compared to 22 in the previous reporting period. This represents an increase of approximately 90%.

Finally, the Canadian Joint Operations Command held 30 summary trials in comparison to 28 in the previous reporting period. This represents an increase of approximately 7%. Since 2017-18, the number of summary trials held by the Canadian Joint Operations Command summary has varied, displaying no significant pattern of increase or decrease.

**FIGURE 2-4:**  
NUMBER OF SUMMARY TRIALS FOR THE CANADIAN ARMY, THE ROYAL CANADIAN NAVY, THE ROYAL CANADIAN AIR FORCE, MILITARY PERSONNEL COMMAND, AND THE CANADIAN JOINT OPERATIONS COMMAND



## NUMBER OF CHARGES DISPOSED OF AT SUMMARY TRIAL<sup>34</sup>

In this reporting period, there were a total of 502 charges disposed of at summary trial compared to 477 during the 2020/21 reporting period. Figure 2-5 shows the total number of charges disposed of at summary trial since 2017/18, and demonstrates a consistent decrease until the 2020/21 reporting period and a slight increase in this reporting period.

The most commonly charged service offences disposed of at summary trial are under section 90 of the *National Defence Act*, absence without leave and under section 129, conduct to the prejudice of good order and discipline.<sup>35</sup> These charges account for 80% of all charges disposed of by summary trial.

In consideration of the past 5 reporting periods, there has been a consistent decrease in the total number of charges reported for absence without leave. In the current reporting period the total number was 146, compared to 153 in the 2020/21 reporting period.

In this reporting period, there were a total of 253 charges for the offence of conduct to the prejudice of good order and discipline. This reporting period saw a significant increase in the number of charges from the 180 charges reported in the 2020/21 reporting period. Figure 2-6 shows the number of charges for absence without leave and conduct to the prejudice of good order and discipline between 2017/18 and 2021/22.

## NUMBER OF ELECTIONS TO BE TRIED BY COURT MARTIAL

Pursuant to article 108.17 of the *Queen's Regulations and Orders for the Canadian Forces*, an accused person will be offered an election to be tried by court martial, unless the following two criteria are met:

- a. each offence with which the individual has been charged is one of the following: insubordination, drunkenness, absence without leave, quarrels and disturbances, and conduct to the prejudice of good order and discipline (where the offence relates to military training, maintenance of personal
- b. the circumstances surrounding the commission of the offence are so minor in nature that the presiding officer concludes that a punishment of detention, reduction in rank, or a fine in excess of 25 percent of monthly basic pay would not be warranted if the accused person were found guilty of the offence.

FIGURE 2-5:  
NUMBER OF CHARGES DISPOSED OF AT SUMMARY TRIAL

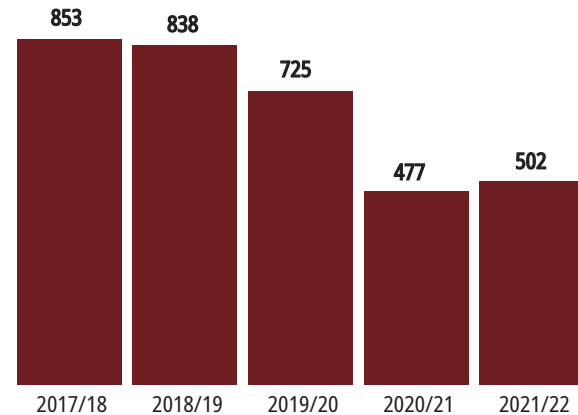
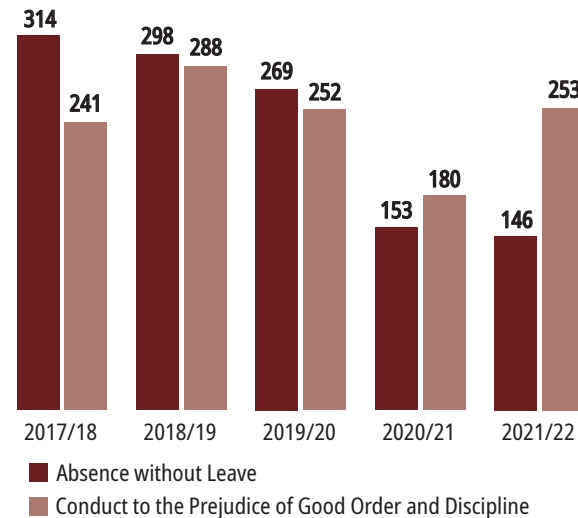


FIGURE 2-6:  
NUMBER OF CHARGES FOR CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE AND ABSENCE WITHOUT LEAVE



equipment, quarters or work space, or dress and deportment); and,

<sup>34</sup> See Annex A, *below*, for a complete breakdown of all charges disposed of at summary trial and corresponding percentage.

<sup>35</sup> See generally *R v Tomczyk*, 2012 CMAC 4 at para 24 (“[s]ection 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF.”); *R v Goltzari*, 2017 CMAC 3 at para 78 (“[m]ilitary discipline requires that conduct be punished if it carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.”).



During this reporting period, a total of 88 elections to be tried by court martial were offered to accused persons. Out of the 88 elections offered, 57 accused persons elected to be tried by summary trial, which represents 65% of the total elections offered. The remaining 31 accused persons elected to be tried by court martial, which represents 35% of the total elections offered. The percentage of accused persons electing to be tried by court martial has increased by 7% from the 2020/21 reporting period.

Figure 2-7 represents the percentage of accused members who elected to be tried by court martial over the past five reporting periods.

Figure 2-8 shows the number of summary trials completed over the past five reporting periods where the accused person was offered an election to be tried by court martial, as well as the number of summary trials completed where no election was offered.

Figure 2-9 shows the percentage of summary trials completed over the past five reporting periods over the past five reporting periods where an accused person was offered an election and elected to be tried by summary trial.

## WAIVER OF LIMITATION PERIODS FOR SUMMARY TRIALS

In order for charges to be dealt with at summary trial a charge must be laid against an accused person within six months from the date on which the service offence is alleged to have been committed, and the summary trial must commence within one year of that date.<sup>37</sup> An accused person has the right to waive one or both of these limitation periods.<sup>38</sup>

FIGURE 2-7: PERCENTAGE OF ACCUSED ELECTING TO BE TRIED BY COURT MARTIAL

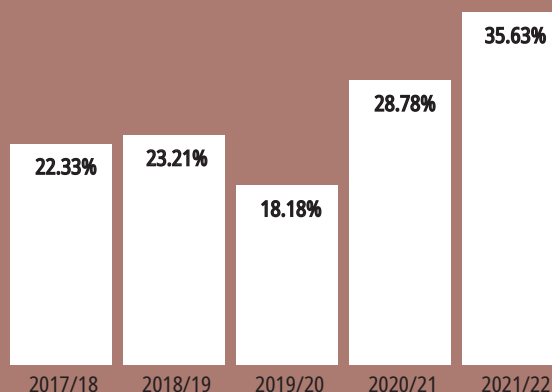


FIGURE 2-8: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ELECTION OFFERED OR NOT OFFERED<sup>36</sup>

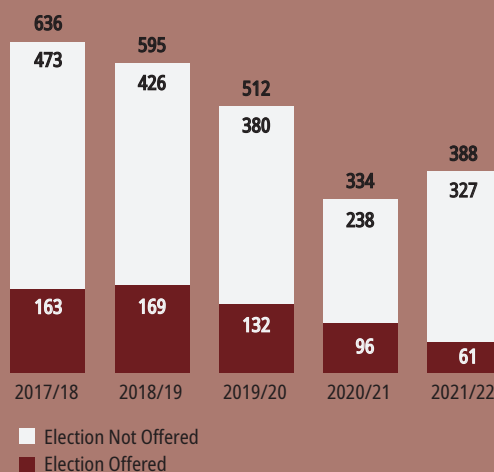
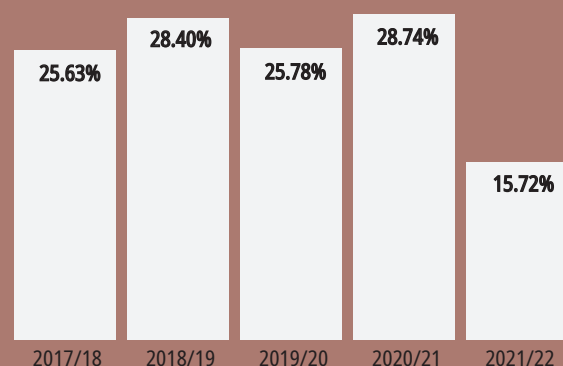


FIGURE 2-9: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ACCUSED OFFERED AN ELECTION, EXPRESSED AS A PERCENTAGE



36 In some cases, an election can be offered during one reporting period, but the summary trial is not completed until the following reporting period.

37 Article 108.16(1.1) of the *Queen's Regulations and Orders for the Canadian Forces*.

38 Article 108.171 of the *Queen's Regulations and Orders for the Canadian Forces*. For a charge to be dealt with at summary trial, where one (or both) of the limitation periods have lapsed and the accused person has not provided a waiver, the presiding officer cannot proceed with the matter. In such circumstances, pursuant to paragraph 108.16(3) of the *Queen's Regulations and Orders for the Canadian Forces*, the presiding officer is required to refer the matter to the next superior officer within the disciplinary chain, who can then refer the matter to the Director of Military Prosecutions for consideration. If the Director of Military Prosecutions makes the decision to prefer charges, the matter can proceed by way of court martial.

In this reporting period, there were 29 waivers offered to accused persons, a decrease of 26 from the 2020/21 reporting period. Of the 29 waivers offered, the accused person chose to waive one or both of the limitation periods in 20 cases.

## RESULTS BY CHARGE AT SUMMARY TRIAL

The findings at summary trial, by charge, have remained relatively consistent over the last five reporting periods. This reporting period saw an increase in the percentage of guilty findings, from approximately 87% in the 2020/21 reporting period, to approximately 90% in this reporting period. Although the number of not guilty findings has decreased from 43 to 40, not guilty findings made up approximately 8% of findings in this reporting period as opposed to approximately 9% in the previous reporting period. A complete breakdown of the total number of findings by charge and the corresponding percentages for the last two reporting periods can be found at Figure 2-10.

## PUNISHMENTS AND ABSOLUTE DISCHARGES AT SUMMARY TRIAL

In this reporting period, there were a total of 467 punishments and absolute discharges imposed at summary trial.<sup>39</sup> Fines and confinement to ship or barracks continued to be the most commonly imposed punishments. Figure 2-11 shows the number of absolute discharges and punishments by type that were imposed at summary trial for the last two reporting periods as well as the corresponding percentages.

In this reporting period, the punishment of detention was imposed 1 time. This number is consistent with the previous reporting period, where 2 punishments of detention were imposed, and none were suspended. An overview of the number of punishments of detention imposed at summary trial over the last five reporting periods can be found in Figure 2-12.

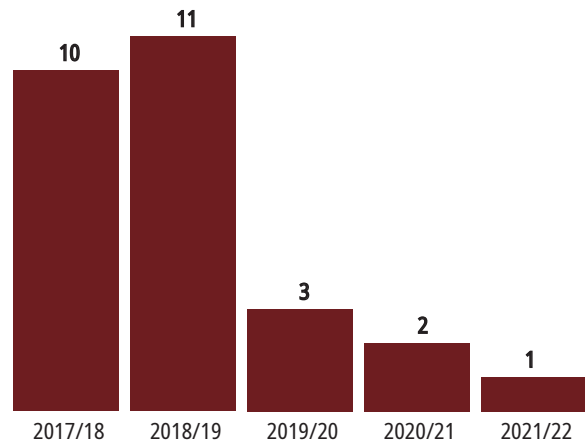
FIGURE 2-10:  
FINDINGS BY CHARGE

	2020-2021		2021-2022	
	#	%	#	%
Guilty	417	87.42	452	90.04
Guilty – Special Finding	3	0.63	4	0.80
Not guilty	43	9.01	39	7.77
Charge stayed	5	1.05	2	0.40
Charge not proceeded with	9	1.89	5	1.00
<b>Total</b>	<b>477</b>	<b>100</b>	<b>502</b>	<b>100</b>

FIGURE 2-11:  
PUNISHMENTS AND ABSOLUTE DISCHARGES AT SUMMARY TRIAL

	2020-2021		2021-2022	
	#	%	#	%
Detention	2	0.49	1	0.22
Reduction in rank	3	0.74	1	0.22
Severe reprimand	4	0.98	2	0.43
Reprimand	23	5.65	23	4.92
Fine	272	66.83	299	64.02
Confinement to ship or barracks	55	13.51	83	17.77
Extra work and drill	36	8.85	52	11.13
Stoppage of leave	8	1.97	1	0.22
Absolute Discharge	4	0.98	5	1.07
<b>Total</b>	<b>407</b>	<b>100</b>	<b>467</b>	<b>100</b>

FIGURE 2-12:  
TOTAL PUNISHMENTS OF DETENTION



<sup>39</sup> More than one type of punishment may be imposed at a summary trial.

## SUMMARY TRIAL REVIEWS

In the current reporting period, a total of 29 summary trials were reviewed pursuant to article 108.45 (requests by members found guilty at summary trial) and article 116.02 (on the review authority's own initiative) of the *Queen's Regulations and Orders for the Canadian Forces*. This represents approximately 8% of the 388 summary trials conducted in this reporting period. The number also represents a consistency with the 8% which is the percentage of reviews conducted during the 20-21 reporting period. Of the reviews, 11 were based on findings, four were based on sentencing, and 14 were based on both findings and sentencing. Figure 2-13 shows the percentage of cases for which a review has been conducted since 2017/18.

In relation to a review, a review authority can render one of the following decisions: to uphold the presiding officer's decision; to quash a guilty finding; or to substitute a finding or punishment imposed at a summary trial. In this reporting period, review authorities quashed 76% of the findings for which a review was undertaken. Additionally, review authorities upheld 17% of the decisions of presiding officers. A complete breakdown of all decisions of review authorities for the past two reporting periods can be found at Figure 2-14.

## CODE OF SERVICE DISCIPLINE OFFENCES - SEXUAL MISCONDUCT

At the summary trial level, charges connected to sexual misconduct, which do not meet the threshold of a sexual offence in the Criminal Code, are most frequently charged under section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline. This includes but is not limited to behaviours such as sexual harassment and the sharing and displaying of inappropriate materials such as comments, videos or photos of a sexual nature.

In the current reporting period, there were a total of 26 charges for the offence of conduct to the prejudice of good order and discipline in relation to sexual misconduct, compared to 22 charges in the previous reporting period. Of these 26 charges, 24 resulted in a guilty finding and 2 in a finding of not guilty. Furthermore, of these 26 charges: 20 were related to verbal comments of a sexual nature; 5 related to physical acts of a sexual nature; and 1 related to displaying materials of a sexual nature.

FIGURE 2-13:  
PERCENTAGE OF SUMMARY TRIALS REVIEWED

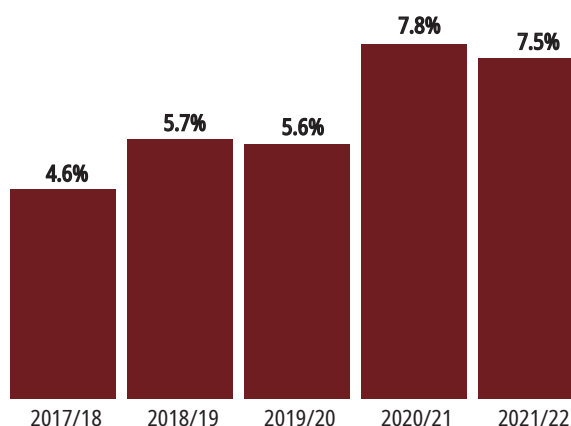


FIGURE 2-14:  
DECISIONS OF REVIEW AUTHORITY

	2020-2021		2021-2022	
	#	%	#	%
Upholds decision	8	30.77	5	17.24
Quashes findings	14	53.85	22	75.86
Substitutes findings	0	0	1	3.45
Substitutes punishment	1	3.85	1	3.45
Mitigates / commutes / remits punishment	3	11.53	0	0
<b>Total</b>	<b>26</b>	<b>100</b>	<b>29</b>	<b>100</b>

## LANGUAGE OF SUMMARY TRIALS

Pursuant to article 108.16 of the *Queen's Regulations and Orders for the Canadian Forces*, accused persons have the right to be tried in the official language of their choice. The presiding officer must be able to understand the language in which the proceedings are to be conducted without the assistance of an interpreter.

In this reporting period, 73% of summary trials were conducted in English and 27% were conducted in French. These numbers are consistent with the previous reporting period. Figure 2-15 shows the total number of summary trials conducted in both English and French for the past two reporting periods.

## Timeline for Summary Trials

The purpose of summary trials is to provide prompt and fair justice in respect of minor breaches of discipline. As such, these trials are required to begin within one year of the date on which the offence is alleged to have occurred, unless this limitation period is waived by the accused person.<sup>40</sup>

This reporting period saw 388 summary trials completed, and the average time from the alleged offence to the conclusion of the summary trial was approximately 94 days. Of these 388 summary trials, 231 concluded within 90 days of the alleged offence, representing approximately 60% of all summary trials for the reporting period. Further, approximately 86% of summary trials were concluded within 180 days of the alleged offence. Figure 2-16 shows a breakdown of the number of days from the alleged offence to the conclusion of the summary trial.<sup>41</sup>

Once a charge is laid by the appropriate authority and is referred to a presiding officer, the presiding officer may be required to obtain legal advice before commencing the summary trial.<sup>42</sup> Once legal advice has been received from the unit legal adviser, the presiding officer may commence the summary trial.

Over the past five reporting periods, the average time between the laying of a charge to the conclusion of the summary trial has fluctuated, reaching a low average of 15 days in the 2017/18 reporting period. The time it took

<sup>40</sup> *National Defence Act*, *supra* note 4, ss 163(1.1)—(1.2), 164(1.1)—(1.2).

<sup>41</sup> Effective 1 September 2018, the accused person may waive the one year limitation period to commence a summary trial.

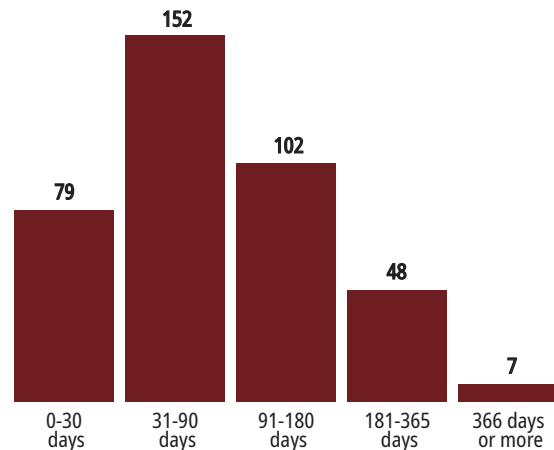
<sup>42</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 15, art 107.11.

during the current reporting period to hold a summary trial was on average 10 days less than the last reporting period. The current reporting period shows an average of 28 days from charge laid to summary trial. Figure 2-17 shows the average time from charge laid to the conclusion of the summary trial over the last five reporting periods.

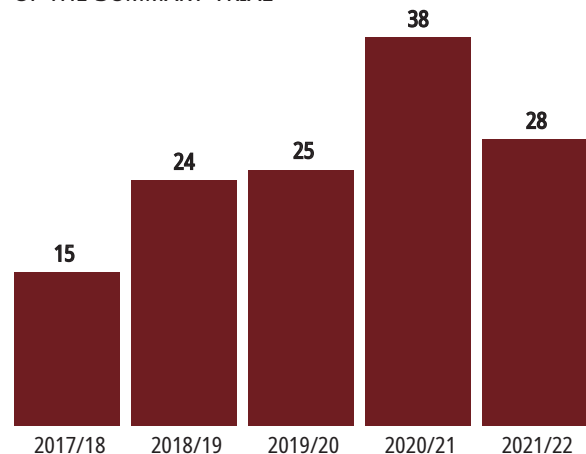
**FIGURE 2-15:**  
LANGUAGE OF SUMMARY TRIALS

	2020-2021		2021-2022	
	#	%	#	%
Number in English	263	78.74	284	73.20
Number in French	71	21.26	104	26.80
<b>Total</b>	<b>334</b>	<b>100</b>	<b>388</b>	<b>100</b>

**FIGURE 2-16:**  
NUMBER OF DAYS FROM ALLEGED OFFENCE TO THE CONCLUSION OF THE SUMMARY TRIAL FOR REPORTING PERIOD 2021/22<sup>41</sup>



**FIGURE 2-17:**  
AVERAGE TIME FROM CHARGE LAID TO CONCLUSION OF THE SUMMARY TRIAL



# Courts Martial<sup>43</sup>

## NUMBER OF COURTS MARTIAL

During this reporting period, 48 courts martial were conducted, representing approximately 11% of all trials held by service tribunals. This is an increase of 14 courts martial from the previous reporting period. Figure 2-18 demonstrates the number of courts martial by year since 2017/18.

## RESULTS BY CASE AT COURT MARTIAL

Of the 48 courts martial held during this reporting period, 33 cases resulted in a finding of guilty on at least one charge; 14 cases resulted in a finding of not guilty of all charges or a stay of proceedings; 1 case the accused was found not criminally responsible on account of a mental disorder; 0 cases resulted in a termination of proceedings; and 0 cases resulted in all charges being withdrawn. Figure 2-19 shows the disposition by case over the past two reporting periods.

## DIRECTOR OF MILITARY PROSECUTIONS CASE MANAGEMENT

### REFERRALS

During this reporting period, the Director of Military Prosecutions received a total of 91 referrals or requests for charges to proceed for trial by court martial, an increase of 15 cases from the previous reporting period. There were 14 cases carried over from the previous reporting period resulting in a total of 105 referrals dealt with in 2021/22. This number represents a decrease of 15% when compared to the 123 referrals processed in the previous reporting period.

Figure 2-20 shows the number of referrals received by the Director of Military Prosecutions over the last five reporting periods and the number of referrals processed within each respective reporting period.

FIGURE 2-18:  
NUMBER OF COURTS MARTIAL

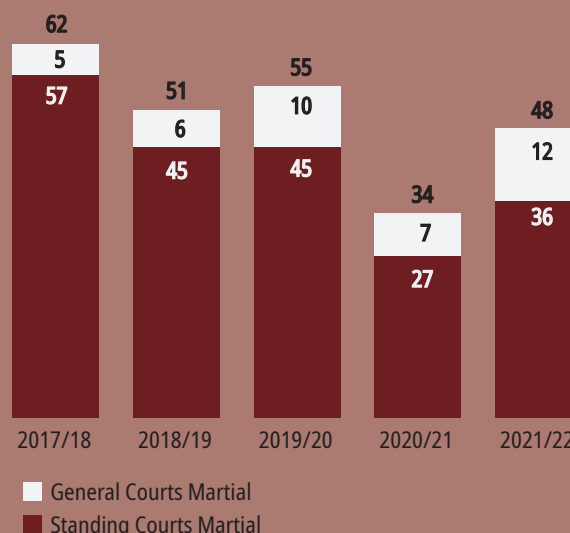
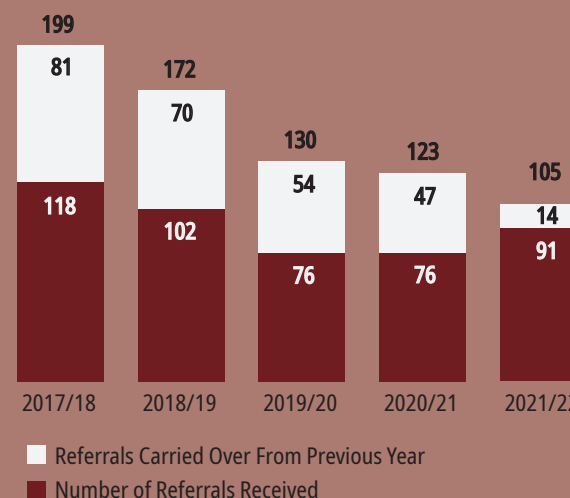


FIGURE 2-19:  
DISPOSITION OF CASES AT COURT MARTIAL

	2020-2021		2021-2022	
	#	%	#	%
Found Guilty of at Least One Charge	25	73.53	33	68.75
Not Guilty of All Charges or Stay of Proceedings	7	20.59	14	29.17
Not Criminally Responsible	0	0.00	1	2.08
Withdrawal of All Charges	1	2.94	0	0.00
Termination of Proceedings	1	2.94	0	0.00
<b>Total</b>	<b>34</b>	<b>100</b>	<b>48</b>	<b>100</b>

FIGURE 2-20:  
NUMBER OF REFERRALS



<sup>43</sup> See Annex C, *below*, for the Director of Military Prosecutions' Annual Report and further statistical data.

## PREFERRALS AND NON-PREFERRALS

During this reporting period, the Director of Military Prosecutions proceeded with charges or preferred charges in 51 cases for trial by courts martial and there were 21 cases where the Director of Military Prosecutions did not proceed with or prefer any charges. The percentage of cases preferred for trial by court martial in this reporting period was 71%. Although the number of cases preferred represents a slight decrease from the 2020/21 reporting period in which 55 cases were preferred, the percentage of preferrals has decreased by 6%.

Figure 2-21 illustrates the number of cases preferred by the Director of Military Prosecutions and the number of files where no charges were preferred over the past five reporting periods.

## PUNISHMENTS AT COURT MARTIAL

Figure 2-22 breaks down the punishments imposed by courts martial over the past two reporting periods. The most common punishments imposed continues to be fines, followed by severe reprimands.



FIGURE 2-21:  
NUMBER OF PREFERRALS AND NON-PREFERRALS<sup>44</sup>

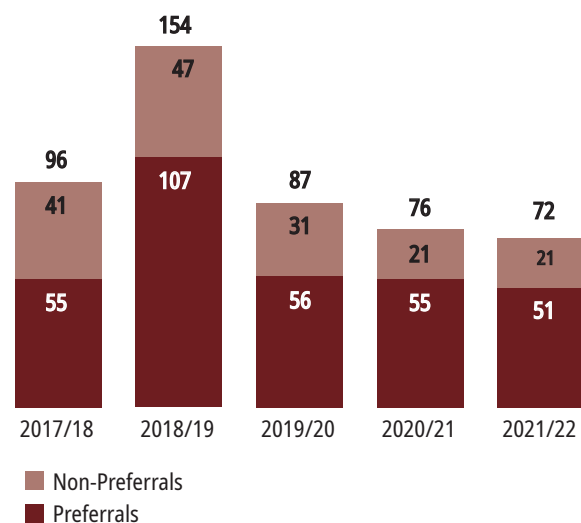


FIGURE 2-22:  
PUNISHMENTS AT COURTS MARTIAL

	2020-2021	2021-2022
Dismissal*	0	1
Imprisonment	3	6
Detention	0	2
Reduction in Rank	4	4
Forfeiture of Seniority	0	0
Severe Reprimand	5	8
Reprimand	3	6
Fine	20	22
Confinement to ship or barracks	2	3
Stoppage of Leave	0	0
Absolute Discharge	0	0
<b>Total</b>	<b>37</b>	<b>52</b>

\* Includes dismissal with disgrace.

<sup>44</sup> In accordance with the Director of Military Prosecutions Policy Directive #003/00, Post Charge Review, when considering whether or not a charge will be preferred, the prosecutor must determine if there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued at the post-charge stage. Further information concerning the Director of Military Prosecutions Policies regarding post-charge review can be found at: “Post-Charge Review” (last modified 14 September 2018), online: [Canada.ca](http://Canada.ca) <[www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html](http://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html)>.

## CODE OF SERVICE DISCIPLINE OFFENCES - SEXUAL MISCONDUCT

During this reporting period, a total of 18 completed courts martial (or approximately 38% of all courts martial) dealt with allegations of sexual misconduct. Of those, 7 cases resulted in a finding of guilty; 10 cases resulted in a finding of not guilty or a stay of proceedings; 1 case the accused was not criminally responsible; 0 cases resulted in a termination of proceedings; and 0 cases resulted in all charges being withdrawn by the Director of Military Prosecutions.

In the previous reporting period, a total of 14 courts martial (or approximately 41%) dealt with charges of sexual misconduct, with 9 resulting in a finding of guilt. This reporting period saw an increase of 17% in the number of courts martial dealing with sexual misconduct. Figure 2-23 sets out the sexual misconduct cases by result at courts martial during this reporting period.

FIGURE 2-23:  
SEXUAL MISCONDUCT CASES BY RESULT AT COURTS  
MARTIAL

	2020-2021		2021-2022	
	#	%	#	%
Found Guilty of at Least One Charge	9	64.29	7	41.18
Not Guilty of All Charges or Stay of Proceedings	3	21.43	10	52.94
Not Criminally Responsible	0	0.00	1	5.88
Withdrawal of All Charges	1	7.14	0	0.00
Termination of Proceedings	1	7.14	0	0.00
<b>Total</b>	<b>14</b>	<b>100</b>	<b>18</b>	<b>100</b>







# MILITARY JUSTICE: THE YEAR IN REVIEW

## INTRODUCTION

This chapter examines key military justice developments that occurred over the reporting period in court martial jurisprudence. In previous annual reports, chapter 3 has included a summary of key cases as well as new legislative developments and other policy initiatives. In this year's report, this chapter will focus on jurisprudential developments. Statutory amendments, independent and external reviews and policy initiatives will be discussed in detail in chapter 4.

## JURISPRUDENCE

### Court Martial - Decisions of Note

#### CONSTITUTIONALITY OF SECTIONS 278.92 TO 278.94 OF THE *CRIMINAL CODE*

During this reporting period the constitutionality of sections 278.92-278.93 and 278.94 of the *Criminal Code of Canada (Criminal Code)*<sup>1</sup> were challenged by the accused members in several cases. These sections, which were brought into force by Bill C-51 in 2018,<sup>2</sup> amended the *Criminal Code* provisions that governed the admissibility of a complainant's prior sexual history evidence in sexual assault trials.<sup>3</sup>

The constitutional challenges brought at courts martial during the reporting period mirrored similar challenges brought in civilian criminal trial courts across the country. Dozens of conflicting decisions across several Provincial trial courts resulted in a patchwork of decisions, which either upheld, or invalidated the new provisions. While outside of the reporting period, the issue was ultimately resolved by the Supreme Court of Canada in the civilian case of *R v J.J.* on 30 June 2022, which upheld the constitutionality of sections 278.92 and 278.94 of the *Criminal Code*.<sup>4</sup>

1 *Criminal Code of Canada*, RSC, 1985 c C-46. [*Criminal Code*].

2 Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* [Bill C-51].

3 *Criminal Code*, s 276.

4 *R v J.J.*, 2022 SCC 28 (SCC).

## R v TAIT, 2021 CM 2009

In the court martial of *R v Tait*,<sup>5</sup> the accused challenged the constitutionality of sections 278.93 and 278.94 of the *Criminal Code* on the grounds that they infringed upon his section 7 *Charter* right to make full answer and defence and his section 11(d) *Charter* right to a fair trial.<sup>6</sup> The accused broadly asserted that the cumulative effect of the provisions created a significant burden to introduce evidence, obliged the accused to reveal his trial strategy prematurely, and undermined later cross-examination of the complainant, thereby violating his *Charter* rights.<sup>7</sup>

The *Charter* challenge was ultimately dismissed, with the Military Judge reasoning that the impugned statutory procedure “can be applied in a manner consistent with the principle against self-incrimination, the right to a fair trial, and the complainant’s right to privacy and equality.”<sup>8</sup> In reaching her decision, the Military Judge examined the scope of the amended procedure, clarified that the complainant is entitled to full disclosure of the application materials upon completion of the first application phase<sup>9</sup> and held that the ability of the complainant to cross-examine during the admissibility hearing ought to be limited by the trial judge to the specific evidence to minimize the risk of defence disclosure by the accused, while allowing the victim to defend their privacy interest.<sup>10</sup> In addition, the Military Judge opined that trial judges should be afforded the discretion to determine the moment when a notice of application is provided to the complainant so as to balance and preserve the participatory rights of the complainant and the trial rights of the accused.<sup>11</sup>

In her decision, the Military Judge noted that trial courts across the country have been divided on whether the amended provisions passed constitutional scrutiny, and that there were no appeal court decisions on the matter. Within the military justice system, the decision in *R v Tait* upheld the constitutionality of sections 278.93 and 278.94 of the *Criminal Code*. The reasoning of the court was followed in subsequent court martial cases of *R v Stewart*<sup>12</sup> and *R v Kohlsmith and Zapata-Vales*<sup>13</sup>.

5 *R v Tait*, 2021 CM 2009 [*Tait*].

6 *Ibid.*

7 *Ibid.*, at paras 30-32.

8 *Ibid.*, at para 40.

9 *Ibid.*, at paras 66-68.

10 *Ibid.*, at para 79.

11 *Ibid.*, at paras 114-116.

12 *R v Stewart*, 2021 CM 5012.

13 *R v Kohlsmith and Zapata-Vales*, 2021 CM 3007.

## ADMINISTERING NOXIOUS SUBSTANCES

### R v COGSWELL, 2021 CM 2017<sup>14</sup>

Although the circumstances at the heart of the decision in *Cogswell* occurred before the legalization of recreational cannabis in Canada, the case remains noteworthy for the Military Judge’s examination of the risks associated with the consumption of cannabis or any other potentially noxious substance during military exercises and operations. Moreover, the decision is relevant to the judicial assessment of circumstantial evidence.

On 21 July 2018, W Battery of the Royal Canadian Artillery School was scheduled to participate in live fire training during Exercise Common Gunner at Canadian Forces Base Gagetown, New Brunswick. Bombardier Cogswell, who was assigned to the unit’s mobile canteen, distributed cupcakes to members of two separately located gun detachments. Shortly thereafter, eight soldiers reported various symptoms consistent with the ingestion of cannabis some while operating heavy vehicles and moving artillery pieces. As some of the soldiers began to suspect cannabis intoxication, the Commandant of the Royal Canadian Artillery School requested a military police investigation into the matter. Urine samples were voluntarily submitted by five of the soldiers involved, all of which were positive for marijuana metabolites. Likewise, one of the cupcake wrappers was obtained and testing revealed the presence of tetrahydrocannabinol. The accused was subsequently charged with one count of disgraceful conduct under section 93 of the *National Defence Act*; eight counts under section 130 of the *National Defence Act*, namely, administering a noxious thing contrary to section 245(1)(b) of the *Criminal Code*; and nine counts of acting to the prejudice of good order and discipline under section 129 of the *National Defence Act*, as alternates to the other charges.

The evidence presented at trial to prove the element of “administering” was circumstantial in nature, while direct evidence was used to prove the actual distribution of the alleged noxious substance by the accused. The salient issue was that no one witnessed the accused put cannabis in the cupcakes.<sup>15</sup> In cases involving circumstantial evidence, the trier of fact cannot convict the accused unless the possible inferences from the circumstantial evidence leave no reasonable doubt about the guilt of the accused.<sup>16</sup>

14 *R v Cogswell*, 2021 CM 2017 [*Cogswell*].

15 *Ibid.*, at para 24.

16 *Ibid.*, at paras 25-26.

The Military Judge was convinced beyond a reasonable doubt that the accused added the cannabis to the cupcakes. In reaching her decision, she assessed the common factual elements of the charges in sequence, beginning by first establishing that the victims had consumed cannabis that day. This conclusion was based on the combined effect of the urine tests, unrefuted evidence that two victims had never consumed cannabis prior to testing positive, and the unlikelihood that the victims would have otherwise voluntarily submitted themselves to drug testing given the legal repercussions that could have followed a positive result for any other prohibited drug.<sup>17</sup> Next, the Military Judge examined whether the cupcakes were the source of the cannabis. The consumption of the cupcakes was determined to be the only plausible source of intoxication on account of them being the only common denominator between the soldiers at the two locations visited by the mobile canteen.<sup>18</sup> Finally, the Military Judge considered whether, having baked the cupcakes, the accused put cannabis into them. While the defence asserted that other soldiers could have used droppers to add cannabis to the cupcakes before they were consumed, the Military Judge rejected this assertion given the remoteness of the possibility that someone with a dropper intercepted and contaminated every one of the cupcakes at two different locations.<sup>19</sup> In addition, considering the motives of the accused, her knowledge of and access to cannabis products, and her behaviour as she gave out the cupcakes, the Military Judge was convinced beyond a reasonable doubt that the accused added the cannabis to the cupcakes.<sup>20</sup>

Bombardier Cogswell was found guilty and sentenced to imprisonment for a period of 30 days, dismissal from Her Majesty's service and a reduction in rank to gunner.<sup>21</sup> Gunner Cogswell appealed, and of note, while outside of the reporting period, the Court Martial Appeal Court of Canada on 31 May 2022 dismissed the appeal.<sup>22</sup>

17 *Ibid.*, at paras 109-112.

18 *Ibid.*

19 *Ibid.*, at para 184.

20 *Ibid.*, at para 197.

21 *R v Cogswell*, 2021 CM 2021.

22 *R v Cogswell*, 2022 CMAC 7 (CMAC).

## Court Martial Appeal Court of Canada Decisions

### HISTORICAL BACKGROUND TO SECTION 11(d) APPLICATIONS AND ASSOCIATED APPEALS

During the previous reporting period, decisions challenging the independence and impartiality of military judges dominated the jurisprudence at courts martial.<sup>23</sup> *Charter* applications challenging the independence of military judges, by accused members can be found in sixteen cases. All the cases shared a common central issue whether judicial independence required that military judges not be subject to the Code of Service Discipline in order to comply with section 11(d) of the *Charter*.<sup>24</sup>

The Director of Military Prosecutions, appealed the decisions in *R v Edwards*, *R v Crépeau*, *R v Fontaine*, *R v Iredale* (*Edwards et al.*), and *R v Proulx*, and *R v Cloutier* to the Court Martial Appeal Court of Canada that was heard on 29 January 2021.<sup>25</sup>

The appeals in *R v Proulx* and *R v Cloutier* (*R v Proulx et al.*) were heard jointly on 11 March 2021. These appeals focused on the issue of whether the position of the Office of the Chief Military Judge within the military hierarchy violates an accused's section 11(d) *Charter* rights.

The decision of the Court Martial Appeal Court in *Edwards et al.* was released during this reporting period on 11 June 2021 and its reasoning formed the basis for the subsequent decision of the Court Martial Appeal Court in *R v Proulx et al.* on 17 June 2021.

23 For a more complete summary of s. 11(d) jurisprudence, please refer to, *JAG Annual Report 2020/2021*, "Court Martial – Decision of Note", Chapter 3, pgs 39 to 41.

24 See *R v Pett*, 2020 CM 4002 [*Pett*]; *R v D'Amico*, 2020 CM 2002 [*D'Amico*]; *R v Bourque*, 2020 CM 2008 [*Bourque*]; *R v Edwards*, 2020 CM 3006 [*Edwards*]; *R v Crépeau*, 2020 CM 3007 [*Crépeau*]; *R v Fontaine*, 2020 CM 3008 [*Fontaine*]; *R v Iredale*, 2020 CM 4011 [*Iredale*]; *R v MacPherson and Chauhan and J.L.*, 2020 CM 2012 [*MacPherson*]; *R v Christmas*, 2020 CM 3009 [*Christmas*]; *R v Proulx*, 2020 CM 4012 [*Proulx*]; *R v Jacques*, 2020 CM 3010 [*Jacques*]; *R v Cloutier*, 2020 CM 4013 [*Cloutier*]; *R v Pépin*, 2021 CM 3005 [*Pépin*]; *R v Thibault*, 2021 CM 5002 [*Thibault*]; *R v Brenton* (22 March 2021), 201932 (CM) [*Brenton*]; *R v Brown*, 2021 CM 4003 [*Brown*].

25 See *JAG Annual Report 2020 -2021*, pgs 41-42.

The cases of *R v Christmas*<sup>26</sup> and *R v Brown*<sup>27</sup> were also appealed to the Court Martial Appeal Court of Canada with decisions issued on 13 January 2022 and 8 February 2022 respectively. In each of the cases heard by the Court Martial Appeal Court of Canada on the 11(d) issue, the Court allowed the appeals, overturned the findings of the courts martial, and confirmed that military judges were indeed subject to the Code of Service Discipline.

Accordingly, this reporting period will begin with a discussion of *R v Edwards et al.*

## **R V EDWARDS ET AL., 2021 CMAC 2**

In *R v Edwards et al.*, decided on 11 June 2021 the issue on appeal was whether the status of military judges as officers subject to the Code of Service Discipline and their status within a military chain of command, leaves them vulnerable to interference, real or perceived, so as to violate the section 11(d) *Charter* rights of an accused before a court martial.<sup>28</sup> In its reasons for judgment, the Court Martial Appeal Court of Canada expressed this overarching question in the form of two key issues for analysis: whether a specific Chief of the Defence Staff Order (CDS Order) dated 2 October 2019 violated section 11(d) of the *Charter*; and, whether certain sections of the *National Defence Act* that lawfully support the creation of military orders also violate section 11(d) of the *Charter* in relation to military judges.

In a unanimous decision, the Court held that the specific CDS Order at issue did not violate section 11(d) of the *Charter*. The Court noted that a complete separation between judicial and executive functions is not practicable in Canadian law, and need not be absolute so as to preclude the arrangement found in the military justice system where a judicial official is both a judge and an officer in the Canadian Armed Forces.<sup>29</sup> In reaching its decision, the Court drew attention to Supreme Court of Canada jurisprudence on the subject of judicial independence and impartiality, which does not require absolute independence nor demand adherence to an ideal standard but instead requires a judicial assessment of institutional independence and impartiality as a contextual exercise.<sup>30</sup> A proper *Charter* assessment demands sensitivity to the role and function of courts

martial, the accepted constitutional justifications for the military justice system, and consideration of other factors that bear on the impartiality of military judges.<sup>31</sup> The Court ruled that the purpose of the military justice system is to promote the discipline, efficiency, and morale of the Canadian Armed Forces. This requires an operationally ready and portable military justice system, which includes compliance with the Code of Service Discipline by military judges.

After deciding that military judges can be both judicial officials and officers subject to the Code of Service Discipline, the Court found no merit to the argument that sections 12, 18, and 60 of the *National Defence Act* (or any other provision that grants organizational authority) violated section 11(d) *Charter* on this topic. Equally, the court found that there was no merit to this issue when viewed through the correct lens of Supreme Court of Canada jurisprudence that has repeatedly affirmed the constitutionality of military members being tried by military officers.<sup>32</sup>

## **R V PROULX ET AL., 2021 CMAC 3<sup>33</sup>**

The importance of the *Edwards et al* decision was reinforced by the release of the Court Martial Appeal Court of Canada's decision in *R v Proulx et al* on 17 June 2021. Using the same rationale set out in *Edwards et al.*<sup>34</sup> the Court dismissed all of the grounds of appeal. The Court also drew attention to existing judicial controls granted to the Chief Military Judge over the assignment of judges and administration of the court and echoed the earlier court martial decision in *R v Proulx* noting that the military justice system respects the core requirements of institutional independence set out in governing Supreme Court of Canada jurisprudence.<sup>35</sup>

26 *R v Christmas*, 2022 CMAC 1 (CMAC).

27 *R v Brown*, 2022 CMAC 2 (CMAC).

28 *R v Edwards, R v Crépeau, R v Fontaine, & R v Iredale*, 2021 CMAC 2 at para 4 [*Edwards et al.*].

29 *Ibid.*, at para. 75 and See also *Mackeigan v Hickman* [1989] 2 S.C.R. 796 at 827.

30 *Ibid.*, at para 75 citing *R v Lippé*, [1991] 2 SCR 114 at 142.

31 *Ibid.*, at para 74 [a non-exhaustive list of factors is provided, including: the oath of office; statutory protections on the tenure of judges; their remuneration; the conventions governing the exercise of prosecutorial discretion; and the extent to which our Westminster model of constitutional democracy permits members of the judicial branch to perform executive functions].

32 *Ibid.*, at paras 93-94.

33 *Proulx et al.*, 2021 CMAC 3 (CMAC) [*Proulx et al.*].

34 *Ibid.*, at para 14.

35 *Ibid.*, at para 19, citing *Valente v The Queen*, [1985] 2 SCR 673.

## **R v CHRISTMAS, 2022 CMAC 1**

On 13 January 2022, the Court, for the same reasons as set out in *Edwards et al* and *Proulx et al*, allowed the appeal, lifted the stay and ordered the trial to proceed.

## **R v BROWN, 2022 CMAC 2**

On 8 February 2022, the Court, for the same reasons as set out in *Edwards et al* and *Proulx et al*, allowed the appeal, lifted the stay and ordered the trial to proceed.

## **11(d) APPELLATE DECISIONS – SUPREME COURT OF CANADA APPEAL**

Prior to the end of the reporting period, leave to appeal to the Supreme Court of Canada was sought in all of the Court Martial Appeal Court of Canada's decisions connected to judicial independence under section 11(d) of the *Charter*.<sup>36</sup> Of note, in an announcement issued after the reporting period in February of 2023, the Supreme Court of Canada granted leave to appeal all of the cases.

## **R v CHAMPION, 2021 CMAC 4**

The decision in *R v Champion* refined the interpretation of the imposition of release conditions in the absence of a charge, and provided clarity for the military justice system on principles governing pre-charge custody in military law.<sup>37</sup> In this case, the Court Martial Appeal Court of Canada affirmed that military justice system participants can impose release conditions upon a detained member even when a charge has yet to be laid using principles of restraint, necessity and reasonableness.<sup>38</sup>

Sailor Third Class Champion (Sailor Champion) was arrested on 13 November 2020 for alleged drunkenness. He was released by a Custody Review Officer on conditions that included confinement to barracks and sobriety. Sailor Champion was arrested two days later for allegedly breaching these conditions. Thereafter, he remained in the custody of military police until 17 November 2020, at which time he was brought before a Military Judge for a custody review hearing. At the time of the hearing, Sailor Champion had not been charged with any offence.

At the hearing, it was argued on behalf of the arrested member that pursuant to the 2001 Court Martial Appeal Court decision in *R v Larocque*,<sup>39</sup> an arrested person attending a custody review hearing shall be released without conditions if they have not been charged. The Military Judge disagreed with this interpretation of military law and released the accused with conditions. Thereafter, the member was charged on 23 November 2020. In the days that followed, the accused's Commanding Officer decided not to proceed with the charges.<sup>40</sup>

The Court took the opportunity to further examine the statutory obligations incumbent on military judges at custody review hearings. The Court observed that military judges and military justice system participants must be guided by principles of fundamental justice in avoiding undue delay and by only imposing conditions that show restraint, are clearly articulated, necessary and reasonable in the circumstances. It was found that the conditions imposed and the delay in laying charges in this case did not violate principles of fundamental justice.<sup>41</sup>

Furthermore, the Court observed that the absence of statutory criteria for military judges in the *National Defence Act* (regarding the imposition of conditions at custody review hearings where no charges have been laid) affords military judges the flexibility to respond to the unique needs of military justice and "to do so with the aid of their own military experience and knowledge."<sup>42</sup>

Finally, the Court reasoned that even if the imposition of release conditions could have been construed as a deprivation of liberty under section 7 of the *Charter* in a manner not in accordance with the principles of fundamental justice, the decision of the Military Judge or other military justice participant could still be saved by section 1 of the *Charter*. The ability to detain a member without charges for up to 72 hours before appearing before a military judge constitutes a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.<sup>43</sup>

36 SCC 40065 (*Brown*); SCC 40046 (*Christmas*); SCC 39822 (*Proulx et al.*); SCC 39822 (*Cloutier et al.*); SCC 39820 (*Edwards et al.*);

37 *R v Champion*, 2021 CMAC 4 (CMAC) [*Champion*].

38 *Ibid*, at para. 34.

39 *R v Larocque*, 2001 CMAC 2 (CMAC) at para 16 [*Larocque*].

40 Art 108.19(2), *Queen's Regulations and Orders for the Canadian Forces*.

41 *Supra* note 39, at para 46.

42 *Ibid*.

43 *Ibid*, at paras 52-53.

## *R v LÉVESQUE*, 2021 CMAC 5

The principal issue on appeal before the Court Martial Appeal Court of Canada was the place where a custodial sentence was ordered to be served. Consequently, the Court clarified the propriety of an offender's imprisonment in a service prison after their release from the Canadian Armed Forces, as well as the procedure for determining where the custodial sentence is served.<sup>44</sup> In this case, the offences took place while the appellant was a service member. However, he was tried and sentenced to three months in prison, for which he was ordered to serve the sentence in a service prison after his release from the Canadian Armed Forces.<sup>45</sup> The appeal was granted and an order for the appellant to serve his sentence in civilian prison was issued.

Article 114.06 of the *Queen's Regulations and Orders for the Canadian Forces* identified that sentences of imprisonment for less than two years are to be served in a service prison if it is established that the exigencies of the service so require it. Accordingly, serving a term of imprisonment in a civilian prison is the rule, and a service prison is the exception.<sup>46</sup> It is within this regulatory framework that the appellant argued the exigencies of service could not be interpreted to require offenders who are no longer in the Canadian Armed Forces to serve their sentence in a service prison.

The Court did not endorse such a narrow interpretation, holding instead that various circumstances could arise in which the exigencies of service may require incarceration in a service prison even if the offender is no longer a member of the Canadian Armed Forces.<sup>47</sup> The Court also clarified that once a sentence of imprisonment is imposed, the parties at sentencing hearings should be permitted to make additional submissions regarding the place of incarceration after a sentence of imprisonment has been imposed. In the case of the appellant, it was held that he should have had an opportunity to make submissions at his sentencing hearing regarding the negative impact that service imprisonment would have had on his ongoing treatment for pre-existing medical conditions.<sup>48</sup>

---

44 *R v Lévesque*, 2021 CMAC 5 (CMAC) [Lévesque].

45 *R v Lévesque*, 2020 CM 5014.

46 *Supra* note 44 at para 5.

47 *Ibid*, at para 9.

48 *Ibid*, at para 21.

## Supreme Court of Canada

### *R v MCGREGOR*, 2020 CMAC 8

This case was first reported on in the 2020-2021 Annual Report.<sup>49</sup> Corporal McGregor was stationed in Washington, D.C. and resided in Alexandria, Virginia, when he became the subject of a criminal investigation by the Canadian Forces National Investigation Service due to an audio recording device discovered in another member's residence. The Canadian Forces National Investigation Service sought assistance from the Alexandria Police Force to execute a search warrant for Corporal McGregor's residence and seize any electronic devices found therein.

As a result of the search, Corporal McGregor was arrested and charged. At court martial, Corporal McGregor brought a motion pursuant to section 24(2) of the *Charter* to exclude the evidence obtained from the search and seizure. The Military Judge dismissed the motion and held that the *Charter*, as Canadian law, did not apply extraterritorially.<sup>50</sup> He appealed the decision to the Court Martial Appeal Court of Canada.

The heart of the issue before the Court Martial Appeal Court of Canada was the extraterritorial applicability of the *Charter*. Corporal McGregor contended that the *Charter* applied to a search of real property and personal property within the territorial sovereignty of the United States. The Court's decision was predicated on the analytical framework laid out by the Supreme Court of Canada in *R v Hape*.<sup>51</sup> Specifically, the jurisprudence outlines that search warrants, as a quintessential exercise of a state's sovereign authority, are governed by the principles of sovereign equality, non-intervention, and comity. The Court opined extensively on the problematic nature of the *Charter* applying to the actions of foreign judicial or police authorities, effectively obliging them to create ad hoc *Charter* compliant procedures during a co-operative law enforcement investigation. The principles outlined in *R v Hape*, preclude the application of Canadian law and standards to searches and seizures conducted in the territory of another state.<sup>52</sup> The Court Martial Appeal Court of Canada unanimously dismissed the appeal.

---

49 See *JAG Annual Report 2020-2021*, pgs 42-43.

50 *R v McGregor*, 2018 CM 4023.

51 *R v Hape*, 2007 SCC 26 [Hape].

52 *R v McGregor*, 2020 CMAC 8, (CMAC) at para 31.

Corporal McGregor filed a notice of application for leave to the Supreme Court of Canada on 25 January 2021, with leave to appeal granted on 14 October 2021.<sup>53</sup> Outside of the reporting period the Supreme Court of Canada heard oral arguments on 19 May 2022, and subsequently unanimously dismissed the appeal. The decision of the Supreme Court of Canada will be discussed in greater detail in the 2022-2023 annual report.

---

53 *Corporal CR McGregor v Her Majesty the Queen*, Supreme Court of Canada Docket 39543, online: <https://scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=39543>







# MILITARY JUSTICE: EVOLUTION, TRANSFORMATION AND MODERNIZATION

## INTRODUCTION

This Chapter will examine key activities and developments relating to the military justice system that occurred over the reporting period and outside of the case law, with each of which contributing to the system's ongoing evolution and change.

The Supreme Court of Canada (SCC) has consistently held that the military justice system is designed to meet the unique requirements of the military as it relates to discipline, efficiency, and morale. As recently as its 2019 decision in *R v Stillman*,<sup>1</sup> the SCC has reinforced this fundamental purpose while recognizing that the complexion of the system has changed over time in response to legal and societal developments and expectations.<sup>2</sup>

The Department of National Defence and the Canadian Armed Forces have fundamentally committed to establishing a culture that embodies shared professional values and ethos; embraces the diversity and values of Canada; ensures a dignified, equitable, respectful, and inclusive institution and supports continued operational excellence. In parallel with these culture change initiatives, the military justice system is itself in the midst of profound change and modernization.

As outlined below, the recommended reform of the military justice system that is currently under a comprehensive process of study and development represents, the most significant body of potential change to military justice since the 1950s. While complex and requiring time to fully implement, work is underway

to fulfill these initiatives and ensure the system evolves with contemporary legal norms and social values while continuing to promote the operational effectiveness of the Canadian Armed Forces.

The Office of the JAG is committed to ensuring that the military justice system continues to grow and advance to meet the needs of the Canadian Armed Forces and the expectations of Canadians.

## INDEPENDENT REVIEWS

Section 273.601 of the *National Defence Act* (NDA) requires that the Minister of National Defence cause periodic independent reviews of specified provisions of the NDA, including those pertaining to the military justice system. The requirement for statutorily mandated independent reviews was first introduced in 1998 and modified in 2014 resulting in the current requirement for the Minister to cause an independent review of specified provisions of the NDA and their operation and to table a report of the review before Parliament at specified regular intervals.

The First Independent Review was completed by the late Right Honourable Antonio Lamer in 2003. In the First Independent Review, 88 recommendations were made designed to enhance the independence of key military justice actors, in particular the military judges and the Director of Defence Counsel Services, and to improve the grievance and military police complaints procedures. Most of these recommendations were accepted by the Government. To address the recommendations requiring

<sup>1</sup> *R v Stillman*, 2019 SCC 40 (SCC) (*Stillman*).

<sup>2</sup> *Ibid*, at para 36.

statutory amendment, legislation was introduced numerous times over the next 10 years. However, it was finally in 2013 that the NDA amendments required to implement the government's response to the First Independent Review were made.

The Second Independent Review was completed by the Honourable Patrick LeSage in 2011 and was tabled in Parliament in 2012. Amongst its 55 recommendations was a call for a comprehensive review of the sentencing provisions of the NDA, changes to the eligibility and selection of members for court martial panels, and consideration for certain measures to improve the fairness and efficiency of the grievance process. The Government response to the recommendations, most of which were accepted, is substantially reflected in regulatory amendments brought into force in 2018.

## The Third Independent Review

On 1 June 2021, the Third Independent Review was tabled in Parliament [completed by the Hon. Morris J. Fish].

The report of the Third Independent Review is the largest to date in terms of both breadth and depth of proposed changes to the military justice system. Approximately 64 of 107 recommendations directly pertain to the military justice system, and another 43 touch upon aspects of the military justice system more broadly. Among other things, the more substantive recommendations include: establishing a Permanent Military Court of Canada,<sup>3</sup> civilianizing military judges<sup>4</sup> and enhancing the independence of key military justice actors. For example, the Third Independent Review recommends exploring in working groups the full or partial civilianization of military prosecutors and defence counsel or distinct career paths for military litigation counsel inclusive of promotion.<sup>5</sup>

There are two overarching themes in the report of the Third Independent Review: (1) it re-affirms that there is a demonstrably justified need for a separate military justice system to maintain discipline, efficiency, and morale in the Canadian Armed Forces; and (2) it presents a new era of reform by continuing the trend

away from a command-centric system by strengthening the independence of military justice system actors.

The Minister of National Defence accepted in principle all 107 recommendations of the Third Independent Review and committed to beginning the implementation of 36 of these recommendations in the short term. The remaining recommendations will be reviewed by the Department of National Defence and Canadian Armed Forces with a view to develop a work plan for implementation.

The Judge Advocate General welcomed the Third Independent Review, noting that it, “provides an important opportunity to ensure the military justice system continues to evolve as it is brought into a new era of modernization.” As noted in Chapter 1, the completion of the Third Independent Review together with the Minister's appointment of Justice Arbour on 21 April 2021 to conduct her independent and external review led the Judge Advocate General to stand up the Military Justice Modernization (MJM) Division in July 2021. The standing up of the MJM Division was a precursor to the promulgation of the *Chief of Defence Staff / Deputy Minister Initiating Directive for the Recommendations of the Third Independent Review of the National Defence Act and Other Related External Comprehensive Reviews*, as well as the companion *Judge Advocate General Initiating Directive*, both of which were signed in the Fall of 2021.

As it relates to implementing external recommendations that impact the military justice system, the Office of the JAG is taking a methodical and deliberate approach. Many of the Third Independent Review recommendations pertaining to the military justice system require in-depth study, policy analysis and the drafting of significant statutory and/or regulatory changes, while other recommendations fall within the responsibility of other government departments and stakeholders.

The MJM Division has been coordinating and working with the Department of Justice to develop a partnership model, study recommendations and collaborate in working groups. The scope of this work is unprecedented, and analyzing and implementing all recommendations, to the extent and in the manner directed by the Minister of National Defence, will require a whole-of-government effort.

3 Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021). [the Third Independent Review]. See Recommendations #4, #5 and #6.

4 *Ibid*, See Recommendations #1 and #2.

5 *Ibid*, See Recommendation #12.

## Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces

On 29 April 2021, the Minister of National Defence announced the launch of an Independent External Comprehensive Review (IECR) of current policies, procedures, programs, practices, and culture within the Canadian Armed Forces and the Department of National Defence. On 20 May 2021, the Honourable Louise Arbour was engaged to undertake the IECR.

The aim of the IECR was to shed light on the causes for the continued presence of harassment and sexual misconduct within the Canadian Armed Forces despite efforts to eradicate it. Additionally the IECR was mandated to identify barriers to reporting inappropriate behaviour to assess the adequacy of the response when reports are made, and to make recommendations on preventing and eradicating harassment and sexual misconduct. To that end, a review that encompassed the recruitment, training, performance evaluation, posting and promotion systems in the Canadian Armed Forces, as well as the military justice system's policies, procedures, and practice, relating to the handling of allegations was conducted.

On 20 October 2021, the IECR released interim recommendations that called for the immediate referral of all sexual assault and other criminal offences of a sexual nature under the *Criminal Code of Canada*<sup>6</sup> to civilian authorities.<sup>7</sup> Shortly thereafter, both the Canadian Forces Provost Marshal and the Director of Military Prosecutions, acknowledged the crisis of public confidence in the military justice system, particularly as it relates to allegations of sexual misconduct. In an exercise of their respective authority as independent statutory actors, they made a joint statement announcing the direction that each had issued, to immediately implement the interim recommendations. The Minister of National Defence also accepted the interim recommendations.<sup>8</sup> While outside of the reporting period it is important to note that the final report of the IECR was issued in May of 2022.

## Governance structure for the Implementation of External Comprehensive Reviews

In addition to its role in supporting the Judge Advocate General in their role as the superintendent of the administration of military justice, the MJM Division provides leadership and personnel support to the External Comprehensive Review Implementation Committee (ECRIC) governance structure, what was established pursuant to the CDS/DM initiating directive.

The Department of National Defence and the Canadian Armed Forces established the ECRIC as the governance body that would support interdepartmental effort to implement the recommendations of the Third Independent Review as well as those from other external comprehensive reviews, including the IECR, and from other consultations or reports mandated by court-ordered class action final settlement agreements endorsed by the Minister of National Defence, the Chief of Defence Staff or the Deputy Minister.

The structure of the ECRIC is premised on a whole-of-government approach and is the product of considered consultation and collaboration between many stakeholders, including the Judge Advocate General as the superintendent of the administration of military justice. In particular, the Judge Advocate General occupies the role of Co-Chair (with the Vice Chief of the Defence Staff) of the strategic oversight echelon for the ECRIC.

The Deputy Judge Advocate General responsible for the MJM Division holds the role of Deputy Co-Chair of the management echelon of the Permanent Secretariat for the ECRIC (called the Director General External Review Implementation Secretariat (DGERIS)). Additionally, legal officers from the MJM Division are engaged to provide technical/legal advice to the ECRIC and are working in close collaboration and liaison with lawyers from other government departments, in particular the Department of Justice.

6 *Criminal Code of Canada*, RSC 1985, c C-46.

7 Canada, *Interim Recommendations from Independent External Comprehensive Review team*, by the Hon. Louise Arbour (Ottawa, 2021).

8 Canada, *Minister of National Defence's response to interim recommendations*, by the Hon. Anita Anand (Ottawa, 2021).

# BILL C-77

## Legislative and Regulatory Development and Implementation

Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, received Royal Assent on 21 June 2019, and at the time writing this report, we are aware that the provisions of Bill C-77 that did not come into force on Royal Assent were brought into force on 20 June 2022.<sup>9</sup> Bill C-77 is a critically important milestone in the evolutionary journey of the military justice system, and while its remaining provisions came into force after the close of the reporting period, it is important to briefly describe here the changes that Bill C-77 has made to the military justice system.

Of particular importance, Bill C-77 established a statutory Declaration of Victims' Rights (DVR), which introduces new rights for victims of service offences, including the rights to information, protection, participation, and restitution. Bill C-77 also created the role for a Victim's Liaison Officer (VLO), whose support may be requested by the victim of a service offence. The VLO will serve to assist victims of service offences by explaining how service offences are charged, dealt with, and tried under the Code of Service Discipline.

Additionally, Bill C-77 introduced the summary hearing process - a non-penal, non-criminal disciplinary process grounded in administrative law principles - and retired the former penal law summary trial system. Finally, Bill C-77 included a series of procedural changes aimed at enhancing the independence of key military justice system actors and aligning certain court martial powers and procedures with the civilian criminal justice system.

## Consultation and Engagement in Support of the Implementation of the DVR

Over the reporting period and to ensure that the implementation of the DVR would appropriately address the needs of victims of service offences as well as the interests of justice, significant consultations were undertaken with a variety of internal and external organizations, as well as experts, interested parties, and victim and survivor advocacy groups. The Department of National Defence and the Canadian Armed Forces recognized that the military justice system required greater procedural support for victims of service offences, and as a result, conducted two surveys for the purpose of consulting and obtaining the views of participants. The first internal survey received 1735 responses from current Department of National Defence employees and members of the Canadian Armed Forces. The second external survey conducted in cooperation with Veterans' Affairs Canada received 299 responses from former Canadian Armed Forces members.

These consultations provided enlightening and useful information that was used in the development of the regulations needed to support Bill C-77 implementation, with regard to establishing the eligibility conditions for appointment as a VLO and developing the DVR complaint mechanism. From the surveys, the views expressed on the military justice system were generally negative. Half of the participants in the surveys indicated that access to information for victims was difficult to obtain. In addition, most participants expressed a belief that the military justice system favors the accused. Amongst those who self-identified as victims of service offences, 84% reported the following: experiencing barriers to reporting due to a fear of reprisal and retaliation; lack of support from the chain of command and peers; and an overall lack of confidence in the military justice system.

---

<sup>9</sup> Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 1 [Bill C-77].

# Overview of Changes and Impacts on the Military Justice System

## REGULATIONS & POLICIES

During this reporting period, the Office of the JAG was dedicated to developing the regulations and policies needed to support the implementation of Bill C-77. Together, Department of Justice legislative drafters, the Corporate Secretary, and the Office of the JAG worked as a team and succeeded in developing and achieving approval of over 230 regulatory amendments to the *Queen's Regulations and Orders for the Canadian Forces*.<sup>10</sup> The new regulations were developed in consultation with internal and external stakeholders and with the expert assistance of the Department of Justice and were critical for supporting the implementation of the DVR, the summary hearing process, and the changes to the court martial system. Additionally, to supplement the changes brought in by the new summary hearing process, the Military Justice at the Unit Level Policy (MJULP) was developed to support the existing NDA and QR&O provisions. The MJULP is meant to provide guidance on the pre-charge, pre-hearing, hearing, review, and post-hearing phases – essentially all the phases touching military justice at the unit level.

## DECLARATION OF VICTIMS' RIGHTS (DVR)

The DVR applies to the interactions that victims of service offence have with the military justice system, which begins from the moment a service offence is reported and ends with the offender's sentencing. The DVR applies uniquely to individuals who are the victim of a service offence as defined in s. 2(1.1) of the NDA. Modeled after the *Canadian Victims Bill of Rights*,<sup>11</sup> the statutory rights introduced by the DVR are grouped in four categories and include a complaint mechanism if any rights are denied.

The first category of rights, provide the victim of a service offence the right to information. The DVR grants victims the right to request general information about the military justice system and the role of victims in it.

The second category of rights is the right to protection under which, victims have the right to have their security

and privacy considered by the appropriate authorities in the military justice system inclusive of identity protection.

The third category of rights is connected to participation. The DVR provides to victims the right to express their views about decisions to be made by appropriate authorities that affect their rights under the DVR and to have those views considered. An example is the victim impact statement. Furthermore, Canadian Armed Forces statement of the impact of the offence on the community and on the military's discipline, efficiency and morale can be submitted.

The last category of rights is the right to restitution. Whereby victims now have the right to have the court martial consider making a restitution order against the offender and to have it enforced. As previously mentioned, these important changes for the victims of service offences bring the military justice system in closer alignment with the parallel system of civilian justice.

## VICTIMS LIAISON OFFICER (VLO)

The victim of a service offence can request the appointment of a VLO to assist them in navigating the military justice system. VLOs are a unique feature of the DVR, and are members of the Canadian Armed Forces who, in order to be selected for their role, must meet regulatory criteria and have completed the necessary training. The responsibilities of the VLO are statutorily defined and include but are not limited to the following: explaining the military justice system, assisting victims in obtaining information; and transmitting information on behalf of the victim.

## COMPLAINT MECHANISM FOR VICTIMS

Where a victim believes that one of their rights under the DVR has been infringed or denied, they may choose to submit a complaint. At the time of writing this report, a complaint can be submitted by a victim of a service offence to the Director of External Review. The purpose of the new complaint mechanism is to provide greater transparency and accountability to victims.

## VICTIMS AND SURVIVORS OF SERVICE OFFENCES WEB PAGE

During the 2020-2021 reporting period, the Canadian Armed Forces developed a Victims and Survivors of

<sup>10</sup> Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: DND, 28 June 2019) [QR&O].

<sup>11</sup> *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

Service Offences website. Maintained with current information, this Government of Canada web page provides a one-stop source of information relevant to victims concerning: the military justice system in general; services and programs offered to victims in the military justice system; service offence investigations; court martial proceedings; the right to make a victim impact statement and its contents; the right to restitution; and the protection of privacy and identity. The web page also contains a link to a comprehensive list of services and programs available outside of the Department of National Defence and the Canadian Armed Forces.

## SUMMARY HEARINGS

As of 20 June 2022, the existing summary trial process was effectively retired, and a new summary hearing process, along with a series of service infractions and applicable sanctions were introduced. The summary hearing process establishes unit-level disciplinary proceedings that are non-penal and administrative in nature. The summary hearing is restricted to resolving charges on a balance of probabilities for service infractions, which are acts, omissions, or conduct of a less-serious nature that breach Canadian Armed Forces standards. The summary hearing process is intended to simplify the disciplinary process at the unit level and to improve the chain of command's ability to efficiently address minor breaches of military discipline while maintaining procedural fairness.



## COURT MARTIAL CHANGES

In addition to the general rights articulated as part of the DVR, Bill C-77 introduced several statutory and regulatory changes to court martial procedure to enshrine the support to victims at court martial into the law. The following procedures were addressed by Bill C-77: the use of testimonial aids; the availability of publication bans; new procedures for third-party record applications; and new procedures for Military Judges to issue no contact orders. These changes will more closely align court martial proceedings with the civilian criminal justice system's handling of similar issues, allowing the necessary evolution and improvement of the military justice system.

## CHANGES RELATING TO INDEPENDENT ACTORS

Legislative and regulatory changes introduced by Bill C-77 have the effect of enhancing the independence of key military justice system actors, such as the military police and the Director of Military Prosecutions. For example, since 20 June 2022, all members of the military police assigned to investigative services have been given the authority to lay charges and to refer service offence charges directly and exclusively to the Director of Military Prosecutions for referral to court martial. Additionally, these changes empower the Director of Military Prosecution to exercise final authority over service offences.

## THE C-77 CANADIAN ARMED FORCES SECRETARIAT (C-77 SECRETARIAT)

In March 2021, the Vice Chief of the Defence Staff<sup>12</sup> designated the Deputy Vice Chief of the Defence Staff as the instructing officer for Bill C-77. A Secretariat was established to support the Deputy, as well as to plan and coordinate the implementation of Bill C-77. The C-77 Secretariat synchronized concurrent activities and critical tasks in accordance with the Master Implementation Directive for Bill C-77,<sup>13</sup> in close coordination with Level 1 authorities, other Canadian Armed Forces / Department of National Defence initiatives and other external initiatives to the Bill C-77 effort. The C-77 Secretariat was responsible for the creation and implementation of policies and the development of the training for Canadian Armed Forces members on their new roles and responsibilities arising out of Bill C-77.

<sup>12</sup> The Vice Chief of Defence Staff was the Canadian Armed Forces representative responsible to ensure Bill C-77 policy and training frameworks to support the coming into force of Bill C-77.

<sup>13</sup> Issued under the authority of the Vice Chief of Defence Staff.

# THE SUPERINTENDENCE ENHANCEMENT AND ASSESSMENT PROJECT

The Superintendence Enhancement and Assessment Project (SEAP) was established in 2017 to enable the gathering of objective and measurable data to facilitate the assessment of the administration of the Code of Service Discipline at the unit level and the overall enhancement of the military justice system. The SEAP comprises three main projects: the Justice Administration and Information Management System (JAIMS), the Military Justice System Performance Monitoring Framework, and the Military Justice System Time Standards. Each project is designed to contribute to a more efficient and effective military justice system.

During the reporting period, the strategic importance of the SEAP led the Office of the JAG to create a new directorate within the Military Justice Division entitled the Directorate of Law/ Military Justice Superintendence that is entirely dedicated to the SEAP. By the end of the reporting period, the new directorate was augmented to a total of 20 departmental and Canadian Armed Forces positions. Collectively, this directorate and these initiatives will bring the military justice system into a new era aligned with recent reforms and will also allow the system to quickly adapt to future change.

## The Justice Administration and Information Management System (JAIMS)

The JAIMS is an electronic case management tool designed specifically for the military justice system. It is being developed by the Office of the JAG, in partnership with the Assistant Deputy Minister (Information Management) (ADM (IM)), to seamlessly and electronically track military justice files from the reporting of an alleged offence, through to investigation, charge laying, trial disposition and review or appeal in both summary hearing and court martial procedures.<sup>14</sup> Development of the JAIMS is a key initiative within the SEAP.

In the first half of the reporting period, JAIMS (1.0) entered into production and was rolled out to a small number of units. These units have provided valuable feedback that has enabled continuous development of the system. In the fall of 2021, the Office of the JAG and ADM (IM) commenced this next phase of development for the JAIMS, which will incorporate the changes to the NDA that will be implemented with the coming into force of Bill C-77, known as JAIMS (2.0). Using the Bill C-77 draft regulations and policies, the teams from the Office of the JAG and ADM(IM) developed and began implementing new business requirements to reflect the new summary hearing system.

In order to ensure proper resourcing would be available to the JAIMS project, in January of 2022, a budget letter submission was made to the Treasury Board for over \$15 million in funding to continue JAIMS (2.0) development through to its planned launch at the end of 2024 and through to the completion of further planned upgrades by the end of fiscal year 2026-2027. Additionally, during this reporting period, the Office of the JAG completed both a privacy impact assessment and a security review of the JAIMS in cooperation with the Director of Access to Information and Privacy, and the Director of Information Management Security, respectively. Both initiatives will greatly assist in the development of JAIMS (2.0).

---

<sup>14</sup> For more information on this innovative, electronic case management tool and database, see *The Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2019 to 31 March 2020* (Cat. No. D1-16, ISSN 1497-7184) at p. 52, online: [Canada.ca <www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html>](http://Canada.ca <www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html>).

## Military Justice System Performance Monitoring Framework

The Military Justice System Performance Monitoring Framework<sup>15</sup>(MJS-PMF) is a robust series of justice indicators that will report on the effectiveness, efficiency, and legitimacy of the military justice system. The indicators were developed to identify emerging trends, including challenges, while informing measures to address them. The MJS-PMF will permit the Judge Advocate General as superintendent of the administration of military justice, to monitor the performance of the military justice system, draw attention to potential issues, assist with the development of benchmarks for future performance, and monitor the impact of changes to the military justice system. The indicators will provide valuable feedback to policy makers and will ultimately make the military justice system more transparent and accountable.

In February 2022, the MJS-PMF team commenced working again with Professor Yvon Dandurand, a leading international expert on performance monitoring and justice system analytics. With his assistance, the next version of the MJS-PMF will ensure that the indicators accurately reflect the military justice system following the coming into force of the remaining provisions of Bill C-77. An updated MJS-PMF and report is anticipated to be published and integrated into JAIMS in the fall of 2023.

## Military Justice System Time Standards

The Military Justice System Time Standards (MJSTS)<sup>16</sup> are an important SEAP initiative that set out expectations for the timely completion of every phase of the military justice system process. The current MJSTS were developed through consultations with internal stakeholders and were published by Canadian Forces General Message in February 2020. A review and update of the time standards was undertaken in January 2022 to determine what changes are necessary following the coming into force of the remaining provisions of Bill C-77.

The definition, consultation and approval of the new time standards is anticipated to be completed in the fall of 2023. The updated MJSTS will be incorporated into the JAIMS, requiring users to provide a justification should they not meet the time standards. This will assist in identifying and resolving the causes of delays in the military justice system. In combination with the other initiatives under the SEAP, the MJSTS will contribute to the effective operation of the military justice system and the maintenance of discipline, efficiency, and morale of the Canadian Armed Forces.

---

15 For more information on the Military Justice System Performance Monitoring Framework, see *The Annual Rapport of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2019 to 31 March 2020* (Cat. No. D1-16, ISSN 1497-7184) at pp. 57-58 and Annex F, online: [Canada.ca](http://Canada.ca) <[www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html](http://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html)>.

16 For more information on the Military Justice System Time Standards, see *The Annual Rapport of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2019 to 31 March 2020* (Cat. No. D1-16, ISSN 1497-7184) at p. 56 and Annex G, online: [Canada.ca](http://Canada.ca) <[www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html](http://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html)>.



# OTHER POLICY INITIATIVES

## The Military Justice Stakeholders' Forum

The Military Justice Stakeholders' Forum provides an opportunity for the key stakeholders in the military justice system to assemble on a regular basis and engage in a sustained exchange of knowledge, expertise and best practices in relation to subjects of common interest while respecting the professional obligations and independence of the participants. Following a meeting on 28 May 2020 the forum's regular rhythm was disrupted by the COVID-19 pandemic. The forum did not meet during this reporting period; however, by the end of the period, the forum was scheduled for its sixth meeting on 16 June 2022 with a second meeting planned for later in the 2022-2023 reporting period.





# THE WAY AHEAD

The 2021-2022 reporting period marks a critical period in the military justice system's continuing journey of evolution and reform. It was a year during which significant groundwork was accomplished to obtain the approvals needed to bring the remaining provisions of Bill C-77<sup>1</sup> and its supporting regulations into force, and through the tabling of the *Report of the Third Independent Review Authority to the Minister of National Defence*<sup>2</sup> with 64 recommendations relating directly to military justice and receipt of the interim recommendations<sup>3</sup> from the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces<sup>4</sup> (IECR), the course was plotted for potentially monumental future changes to the military justice system. The ongoing evolution of the military justice system involves a multi-year journey that will require continued effort and support from the Office of the JAG and its partners to reach its destination.

Over the reporting period, the Office of the JAG worked tirelessly to advance the growth and evolution of the military justice system over several lines of effort – investments that will bare fruit over future reporting periods. It worked alongside its partners in the Defence Team and the Department of Justice, to complete all steps needed to implement Bill C-77 along with its associated regulations and policies, which we know occurred outside the reporting period on 20 June 2022. The implementation of Bill C-77 brings several fundamental changes to the military justice system including the establishment of the Declaration of Victims Rights, the retirement of summary trials, and the establishment of a new summary hearing process.

At the same time, the Office of the JAG advanced the Superintendence Enhancement and Assessment Project (SEAP), making a pivot in the development of the Justice Administration and Information Management System (JAIMS) to ensure alignment with the changes expected with Bill C-77 implementation and commenced the significant, painstaking work involved with studying each of the Third Independent Review's military justice related recommendations to identify the steps to be taken in relation to each. Updates on each of these important and highly complex initiatives will also be provided in the 2022-2023 Annual Report.

With regard to the IECR, which was launched on 29 April 2021, we are aware as we write this report that the IECR's final report was issued outside the reporting period in May of 2022. We are also aware that during the 2022-2023 reporting period, the Office of the JAG will continue to support the Defence Team to ensure that the recommendations of the IECR and other external reviews are fully considered, and implementation is pursued in a deliberate, synchronized, coherent and phased manner.

Further to the evolution and reform of the military justice system that will arise from statutory, regulatory and policy change, the healthy growth of the system that occurs as a result of decisions at the court martial and appellate court levels can have a similarly important influence on its advancement. At this time we are aware that cases were heard outside the reporting period by both the Supreme Court of Canada and the Court Martial Appeal Court of Canada; these cases, the decisions rendered and the impact of those decisions for the continuing evolution of the military justice system will be explored in the 2022-2023 Annual Report.

1 Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (royal assent 21 June 2019) [Bill C-77].

2 Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021). [the Third Independent Review]

3 Canada, *Interim Recommendations from Independent External Comprehensive Review team*, by the Hon. Louise Arbour (Ottawa, 2021).

4 Canada, *The Report of the Independent External Comprehensive Review*, by the Hon. Louise Arbour (Ottawa, 2022). [IECR]. The final report was issued outside of the reporting period in May of 2022.

# CONCLUSION

To remain relevant and maintain the trust and confidence of Canadians and the Canadian Armed Forces, the military justice system must be agile; it must respond to the evolving Canadian legal and social environment, and it must quickly and decisively embrace needed change. The Office of the JAG is fully committed as a partner to the broader institution and will be unflinching in its continuing support to the Minister of National Defence and the Defence Team in the effort to achieve the necessary evolution of the military justice system and allow it to hold the confidence of the Canadian Armed Forces, its members, and the Canadian public.



# ANNEXES



# ANNEX A: SUMMARY OF CHARGES DISPOSED OF AT SUMMARY TRIAL

1 APRIL 2021 – 31 MARCH 2022  
CURRENT AS OF 2 JUNE 2022

NDA Section	Description	2020-2021		2021-2022	
		#	%	#	%
83	Disobedience of Lawful Command	3	0.62	3	0.59
85	Insubordinate Behaviour	21	4.40	20	3.92
86	Quarrels and Disturbances	24	5.03	19	3.73
90	Absence Without Leave	153	32.07	146	28.68
93	Cruel or Disgraceful Conduct	1	0.20	0	0
95	Abuse of Subordinates	7	1.46	0	0
97	Drunkenness	59	12.36	37	7.27
101.1	Failure to Comply with Conditions	3	0.62	0	0
102	Hindering Arrest or Confinement or Withholding Assistance When Called On	1	0.20	0	0
107	Wrongful Acts in Relations to Aircraft or Aircraft Material	1	0.20	0	0
108	Signing Inaccurate Certificate	1	0.20	0	0
112	Improper Use of Vehicles	4	0.83	4	0.79
114	Stealing	5	1.04	3	0.59
116	Destruction, Damage, Loss or Improper Disposal	1	0.20	4	0.79
117	Miscellaneous Offences	3	0.62	5	0.98
125	Wilfully made a false statement in a document	5	1.04	2	0.39
127	Negligent Handling of Dangerous Substances	2	0.41	1	0.20
129	Conduct to the prejudice of good order and discipline - Alcohol Related	22	4.61	38	7.47
129	Conduct to the prejudice of good order and discipline - Drug Related	8	1.67	7	1.38
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Personal Relationship	1	0.20	6	1.18
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Sexual Harassment	21	4.40	32	6.29
129	Conduct to the prejudice of good order and discipline - Unauthorized Discharge	18	3.77	30	5.89
129	Conduct to the prejudice of good order and discipline - Other	111	23.57	146	28.68
130 (4(1) CC)	Possession of Controlled Substance	0	0	2	0.39
130 (265 CC)	Assault	0	0	1	0.20
130 (266 CC*)	Assault	1	0.20	3	0.59
130 (270 CC)	Assaulting a Peace Officer	1	0.20	0	0
<b>Total</b>		<b>477</b>	<b>100</b>	<b>509</b>	<b>100</b>

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

\* *Criminal Code*, R.S.C., 1985, c. C-46.

# ANNEX B: SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

1 APRIL 2021 – 31 MARCH 2022  
CURRENT AS OF 2 JUNE 2022

NDA Section	Description	2020-2021		2021-2022	
		#	%	#	%
77(f)	Offence against the property or person of any inhabitant or resident of a country in which he is serving	1	0.94	0	0.00
83	Disobedience of lawful command	4	3.77	4	3.15
84	Struck a superior officer	0	0.00	1	0.79
85	Insubordinate behaviour	7	6.61	2	1.57
86	Quarrels and disturbances	3	2.83	0	0.00
86 (a)	Fought with a person subject to the code of service discipline	0	0.00	1	0.79
87	Resisting or escaping from arrest or custody	1	0.94	0	0.00
90	Absence without leave	5	4.72	1	0.79
93	Cruel or disgraceful conduct	7	6.61	11	8.66
95	Abuse of subordinates	0	0.00	5	3.94
97	Drunkenness	6	5.66	2	1.57
101.1	Failure to comply with conditions	0	0.00	1	0.79
109	Low flying	0	0.00	1	0.79
111	Improper driving of vehicle	1	0.94	0	0.00
112 (b)	Unauthorized use of vehicles	0	0.00	2	1.57
114	Stealing	2	1.89	4	3.15
115	Receiving	1	0.94	0	0.00
116	Destruction, damage, loss or improper disposal	1	0.94	0	0.00
117 (f)	Miscellaneous offences	0	0.00	2	1.57
124	Negligent performance of a military duty	1	0.94	1	0.79
129	Conduct to the prejudice of good order and discipline	24	22.65	35	27.56
130 (5(1) CDSA*)	Trafficking in substance	1	0.94	1	0.79
130 (5(2) CDSA)	Possession for purpose of trafficking	2	1.89	0	0.00
130 (8(1)(b) Cannabis Act)	Possessing cannabis that they knew to be illicit	0	0.00	1	0.79
130 (10 (1) Cannabis Act)	Selling cannabis without authorization	0	0.00	1	0.79
130 (10 (2) Cannabis Act)	Possessing Cannabis for the purpose of selling	0	0.00	1	0.79
130 (17(1) Cannabis Act)	Promotion of Cannabis	0	0.00	1	0.79
130 (87 CC**)	Pointing a firearm	1	0.94	0	0.00
130 (152 CC)	Invitation to sexual touching	0	0.00	1	0.79
130 (162 (1) CC)	Voyeurism	0	0.00	1	0.79
130 (162.1 CC)	Transmission of an intimate image without consent	0	0.00	1	0.79
130 (162 (4) CC)	Publication of voyeuristic recordings	0	0.00	1	0.79
130 (172.1 (1)(b) CC)	Luring a child	0	0.00	1	0.79



# ANNEX B: SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

## CONTINUATION

NDA Section	Description	2020-2021		2021-2022	
		#	%	#	%
130 (245(1)(b) CC)	Administering Noxious thing	0	0.00	8	6.30
130 (264(1) CC)	Uttering threats	1	0.94	0	0.00
130 (266 CC)	Assault	0	0.00	4	3.15
130 (267b CC)	Assault causing Bodily harm	0	0.00	1	0.79
130 (271 CC)	Sexual assault	10	9.44	26	20.47
130 (272(2)(b) CC)	Sexual Assault causing bodily harm	0	0.00	1	0.79
130 (279(2) CC)	Forcible confinement	1	0.94	2	1.57
130 (320.13(1) CC)	Dangerous operation	1	0.94	0	0.00
130 (355(2) CC)	Trafficking in property obtained by crime	1	0.94	0	0.00
130 (366(1) CC)	Forgery	12	11.33	0	0.00
130 (368(1) CC)	Using a forged document	11	10.38	0	0.00
130 (372(3) CC)	Harassing communication	0	0.00	1	0.79
130 (430 CC)	Mischief	1	0.94	1	0.79
<b>Total</b>		<b>106</b>	<b>100</b>	<b>127</b>	<b>100</b>

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

\* *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

\*\* *Criminal Code*, R.S.C., 1985, c. C-46.



ANNEX C:  
2021-2022  
DIRECTOR OF MILITARY  
PROSECUTIONS ANNUAL REPORT





National  
Defence

Défense  
nationale



# DMP ANNUAL REPORT 2021-2022

Canada 

# CONTENTS



MESSAGE FROM THE  
DIRECTOR OF MILITARY PROSECUTIONS..... III

THE CANADIAN MILITARY PROSECUTION SERVICE:  
*ORDO PER JUSTITIA*

Duties and Functions of the DMP ..... 1  
Mission and Vision ..... 3  
Canadian Military Prosecution Service ..... 4  
    CMPS Headquarters ..... 4  
    Regional Military Prosecution Offices ..... 5  
    Reserve Force Prosecutors ..... 5  
CMPS Personnel Update ..... 6  
Training and Continuing Legal Education ..... 7  
Temporary Duty ..... 9

MILITARY JUSTICE AND THE COURT MARTIAL SYSTEM

Introduction ..... 11  
Courts Martial ..... 13

COURT MARTIAL PROCEEDINGS: YEAR IN REVIEW

Overview ..... 17  
The COVID-19 Pandemic ..... 18  
Impact of Recommendations Made by Review Authorities ..... 18  
Pre-Charge Advice ..... 19  
Referrals and Post-Charge Reviews ..... 19  
Courts Martial ..... 21  
Notable Court Martial Cases ..... 21  
Court Martial Appeal Court ..... 23  
    Decisions Rendered or Appeals Initiated at the CMAC ..... 23  
Supreme Court of Canada ..... 24  
    Decisions Rendered ..... 24  
    Applications for leave to appeal ..... 24

1

2

3

4

5

6

## COMMUNICATIONS AND OUTREACH

CAF Chain of Command .....	27
CFNIS .....	28
Federal, Provincial and Territorial Heads of Prosecutions Committee .....	28
CMAC Education Seminar .....	29
National Criminal Law Program .....	29

CASE MANAGEMENT SYSTEM .....	31
------------------------------	----

## FINANCIAL INFORMATION

Operating Budget.....	33
-----------------------	----

## ANNEXES

Annex A: Courts Martial	
Annex B: Appeals to the CMAC	
Annex C: Appeals to the SCC	



# MESSAGE



## FROM THE DIRECTOR OF MILITARY PROSECUTIONS

I am pleased to present the Director of Military Prosecutions (DMP) Annual Report for fiscal year 2021-22. This is the first report since my appointment on 29 June 2021. This year has brought many challenges and pressures, both internal and external to the organization. The military justice system experienced significant disruption in the last reporting period as a result of the coronavirus pandemic. While the pandemic still presents challenges, this year has marked a return to a fully functioning military justice system. The collective efforts of all military justice actors have allowed in-person courts martial to resume normally and, to this date, all ongoing cases are expected to be completed within a reasonable time.

Soon after my appointment, I initiated a comprehensive strategic review of our operations and policies. The Canadian Military Prosecution Service (CMPS) is now 22 years old and, with a new leadership team in place, the pending implementation of Bill C-77, and the recommendations of several external reviews, the time was right for a detailed examination of who we are and how we operate. This review is now well underway and I fully expect to begin implementing action plans based on our findings during the next reporting period.

Some things could not wait until we had completed our review. The CMPS took immediate steps to hire three new Reserve Force prosecutors and to speed up the intake process for a previous hire. This process was extremely successful, and the renewal of our Reserve Force military prosecutor cadre will pay significant dividends in the years to come.

Unfortunately, we have had less success in hiring into several civilian support staff vacancies. This has created additional burdens on our existing staff and on our prosecutors, and is something that I have directed must be a priority in the next reporting year. Concurrently, we are committed to finalizing work on job descriptions and classification among our support staff, and providing clarity on management expectations.

On 20 October 2021, Madame Louise Arbour released an interim recommendation as part of her mandate to review sexual misconduct in the Canadian Armed Forces (CAF). On 5 November 2021, The Canadian Forces Provost Marshal and I released a joint statement accepting the interim recommendation and taking immediate steps to begin the transfer of investigation of sexual assault allegations to civilian authorities. We also agreed that any future charges of sexual assault would be laid in the civilian criminal justice system until the CAF has completed its review and consideration of the recommendations of the various external reviews, in particular the Report of the Third Independent Review of the National Defence Act (Fish Report) and the Final Report of the Independent External Comprehensive Review (Arbour Report). On 26 November 2021, I made public my interim direction to military prosecutors in this regard. I look forward to working with the CAF and other stakeholders on this important issue over the coming months.

The CMPS has made significant progress in building our prosecutors' level of experience and knowledge. We have a relatively small, but highly effective and capable team.

This has been due, in large part, to the ongoing support of the Judge Advocate General (JAG) in keeping legal officers posted to the CMPS in their positions for longer than the normal posting cycle. The next challenge will be to make this model sustainable through careful selection and timing of new legal officers into military prosecutor positions, as well as a coordinated return of legal officers to other positions within the Office of the JAG.

I am extraordinarily proud of our excellent team of prosecutors and support staff. I have complete confidence in their ability to meet the challenges that we face over the next several years, and I am very excited about what we can accomplish together over the course of my appointment.

*ORDO PER JUSTITIA*



Colonel Dylan Kerr, CD  
Director of Military Prosecutions



# CHAPTER



# THE CANADIAN MILITARY PROSECUTION SERVICE: *ORDO PER JUSTITIA*

## DUTIES AND FUNCTIONS OF THE DMP

The DMP is the senior military prosecutor in the CAF. He is appointed by the Minister of National Defence (MND) for a fixed term, pursuant to subsection 165.1(1) of the *National Defence Act* (NDA).<sup>1</sup> Under the NDA, the DMP is responsible for preferring all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The DMP acts as counsel to the MND, when instructed, with respect to appeals to the Court Martial Appeal Court (CMAC) and the Supreme Court of Canada (SCC). The DMP is also responsible to provide advice in support of investigations conducted by the Canadian Forces National Investigation Service (CFNIS), which is the investigative arm of the Canadian Forces Military Police. The DMP represents the CAF at custody review hearings before military judges and the CMAC.

The DMP operates under the general supervision of the JAG and, in this regard, the JAG may issue general instructions or guidelines in writing in respect of prosecutions, which the DMP must ensure are made available to the public. The JAG may also issue instructions or guidelines in writing regarding a particular prosecution. The DMP must ensure that these instructions or guidelines are available to the public, unless the DMP considers that doing so would not be in the best interest of the administration of military justice.

---

<sup>1</sup> *National Defence Act*, RSC 1985, c N-5.

Appointed for a four-year term, the DMP acts independently of the CAF and Department of National Defence (DND) authorities when exercising his prosecutorial powers, duties, and functions, and fulfils his mandate in a manner that is fair and impartial. Although the DMP acts under the general supervision of the JAG, he exercises his prosecutorial mandate independently of the JAG and the chain of command. The DMP has a constitutional obligation, like any other public official exercising a prosecutorial function, to act independently of partisan concerns and other improper motives.

In accordance with sections 165.12 and 165.13 of the NDA, when a charge is referred to him, the DMP determines whether to:

- Prefer (or not prefer) the charge;
- Prefer any other charge that is founded on facts disclosed by evidence in addition to, or in substitution for the charge; or
- Refer it for disposal by an officer who has jurisdiction to try the accused person by summary trial in those cases where the DMP is satisfied that a charge should not be proceeded with by court martial.

The DMP may also withdraw a charge that has been preferred.

# MISSION AND VISION

## Our Mission

The CMPS prosecutes cases competently, fairly, and expeditiously in order to promote the operational effectiveness of the CAF through the maintenance of discipline, efficiency and morale.

## Our Vision

The CMPS is an independent prosecution authority serving the needs of military justice, promoting discipline, and enhancing the operational effectiveness of the CAF.

We are a diverse and inclusive organization, committed to the health and well-being of our people.

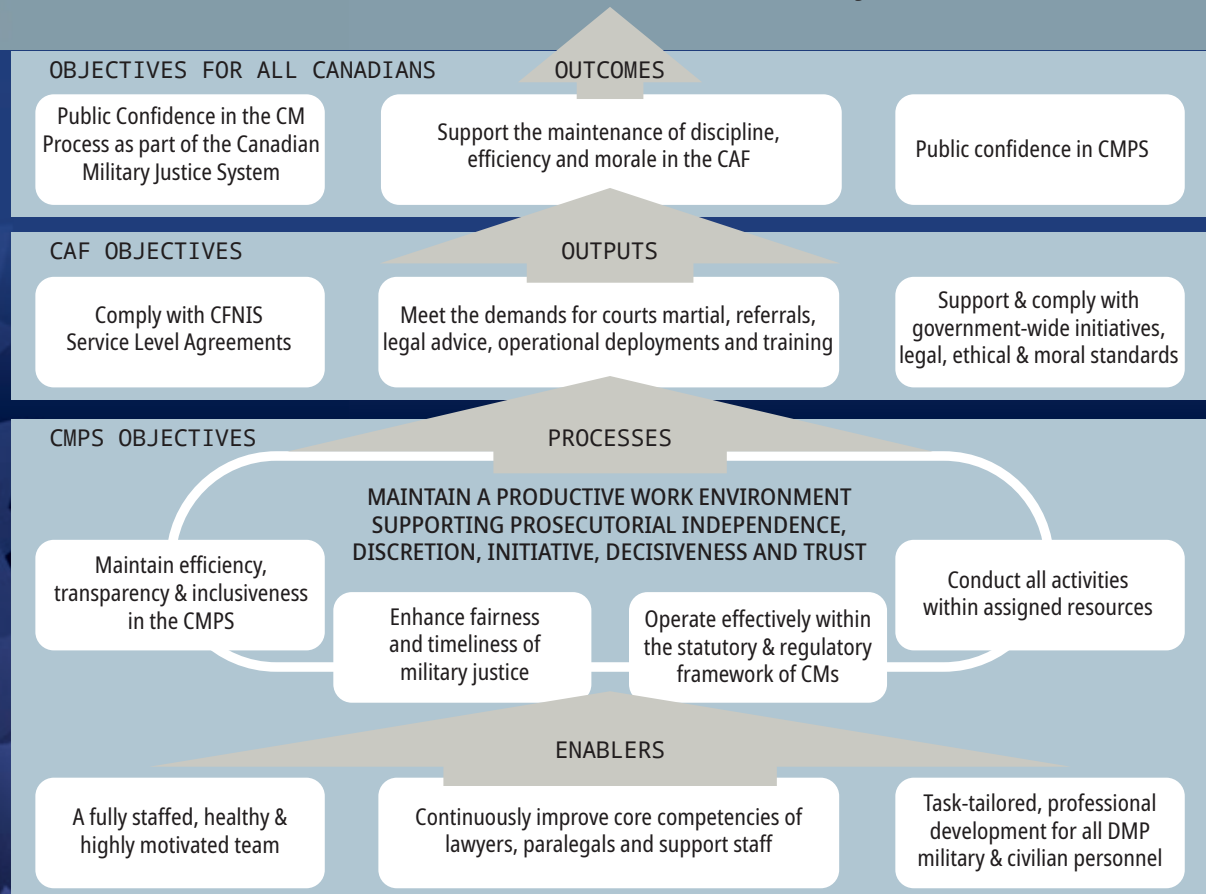
Staffed by dedicated civilian and military professionals, our people hold themselves to a high ethical standard. They have a thirst for learning and constantly strive for excellence.

We are an agile organization, fully capable of operating in any environment, both in Canada and abroad, and are equipped to meet current and future challenges.

Our military officers are leaders who embody the ethos of the profession of arms, uphold the rule of law, and prosecute offences in a fair and transparent manner.

The CMPS is recognized domestically and internationally as a critical and respected partner in the administration of justice, and has the full trust and confidence of the Canadian public, members of the CAF, and the chain of command.

FIGURE 1-1: DMP VISION: DISCIPLINE THROUGH JUSTICE



# CANADIAN MILITARY PROSECUTION SERVICE

In accordance with section 165.15 of the NDA, the DMP may be assisted and represented, to the extent determined by the DMP, by officers who are barristers or advocates with standing at the bar of a province. In this regard, the DMP is assisted by a number of Regular and Reserve Force legal officers appointed to act as military prosecutors, along with a civilian paralegal and support staff. This organization, known as the CMPS, is headquartered in Ottawa and comprised of several Regional Military Prosecution Offices located across Canada.

## CMPS Headquarters

The CMPS Headquarters (HQ) consists of the DMP, the Assistant Director of Military Prosecutions (ADMP), four Deputy Directors of Military Prosecutions (DDMPs), the Senior Counsel, the Appellate Counsel, and the CFNIS Legal Advisor.

### ADMP

The ADMP is responsible to assist the DMP in the corporate governance of the CMPS and supervises the Senior Counsel. The ADMP also fulfills the responsibilities of the DMP in his absence.

### DDMPs

The CMPS has recently redefined the role of the DDMPs:

- The DDMP Operations (DDMP Ops) is responsible for the management of the court martial calendar and file assignments. DDMP Ops supervises and mentors the Regional Military Prosecutors (RMP);<sup>2</sup>
- The DDMP Strategic (DDMP Strat) supervises the Appellate Counsel and the CFNIS Legal Advisor. DDMP Strat tracks all matters of national interest occurring at the trial level and develops standardized legal positions on key areas of law;

<sup>2</sup> The DDMP Ops also supervises prosecutions which occur outside of Canada.

- The DDMP for the Sexual Misconduct Action Response Team (DDMP SMART) is an experienced Reserve Force prosecutor who holds the rank of LCol and who is primarily responsible for mentoring prosecutors in the performance of their duties related to serious sexual misconduct prosecutions; and
- The DDMP Reserves (DDMP Res) is an experienced Reserve Force prosecutor who holds the rank of LCol and who is responsible for the overall supervision and management of Reserve Force prosecutors.

### Senior Counsel

The Senior Counsel is a senior military prosecutor who is responsible to develop the litigation competencies of RMPs and assist the DMP and the ADMP in the governance of the CMPS, which includes staffing, training, policy review and development, drafting of statutory reports, access to information requests, media inquiries, and budget planning and forecasting.

### Appellate Counsel

The Appellate Counsel prepares and files written materials and appears as counsel on behalf of the MND for all matters at the CMAC and the SCC.<sup>3</sup>

### CFNIS Legal Advisor

The CFNIS Legal Advisor is a military prosecutor embedded with the CFNIS and responsible to provide legal advice to members of the CFNIS HQ. The CFNIS Legal Advisor also provides advice to investigators throughout all stages of investigations, as well as updates on developments in the criminal law.

<sup>3</sup> Depending on the caseload for appeal files, it is common for other officers within the CMPS to also appear as counsel or co-counsel at the CMAC and at the SCC.



## Regional Military Prosecution Offices

Each of the five Regional Military Prosecution offices are managed by a Senior RMP. Offices are located in Halifax, Valcartier, Ottawa, Edmonton and Esquimalt.

Senior RMPs are responsible to manage the day-to-day operations of their offices and to supervise their civilian administrative support staff. Senior RMPs and RMPs are also responsible for the conduct of courts martial, for representing the CAF at custody review hearings, and for the provision of legal advice and training to their respective CFNIS detachments.

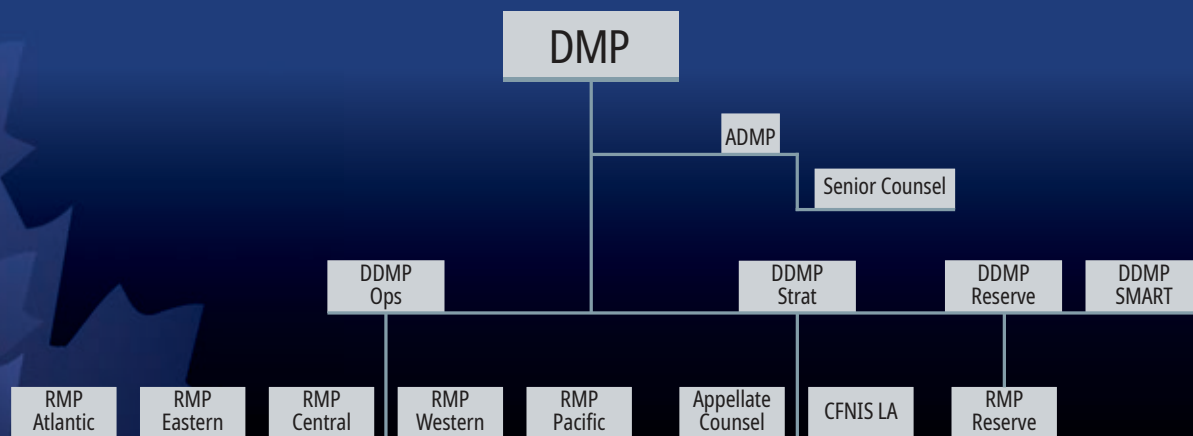
## Reserve Force Prosecutors

The CMPS relies on eight experienced civilian prosecutors who are members of the Reserve Force. These members consist of the DDMP Reserves, the DDMP SMART, and six prosecutors who assist their Regular Force counterparts in the prosecution of cases at courts martial.

The organizational chart for the CMPS can be found at Figure 1-2.



FIGURE 1-2: ORGANIZATIONAL CHART FOR THE CMPS



# CMPS PERSONNEL UPDATE

## Regular Force

On 29 June 2021, Col Kerr was appointed as the new DMP, replacing Col MacGregor who had been the DMP for the previous seven years.

The position of the Appellate Counsel was vacated and filled by the Senior RMP from the Halifax office, leaving a single RMP in that office. A second RMP is expected to be posted to the Halifax office during the next reporting period.

The Senior RMP from the Valcartier office released from the CAF, leaving a single RMP in that office. A second RMP is expected to fill out the empty position remotely during the next reporting period.

The Senior RMP from the Esquimalt office was posted out of the CMPS and replaced by the Senior RMP from the Edmonton office. An experienced legal advisor from the Office of the JAG (OJAG) joined the Edmonton office as an RMP to fill in the vacant position left by the posting of the Senior RMP to Esquimalt.

The Senior RMP for the Ottawa office was moved into the Senior Counsel position and one of the RMPs for that Office took over the role of Senior RMP.

## Reserve Force

During this reporting period three Reserve Force prosecution positions have become vacant. A Selection Board was conducted and the three positions are expected to be staffed in the course of the next reporting period.

## Civilian Personnel

The Administrative Assistant to the DMP left the CMPS and a new Administrative Assistant was hired in the fall.

The Administrative Assistants for the Esquimalt and the Valcartier offices left the CMPS. A new Administrative Assistant was hired in Valcartier, and the position in Esquimalt is expected to be filled in the next reporting period.



# TRAINING AND CONTINUING LEGAL EDUCATION

The need to continue to develop legal skills and keep abreast of key developments in the law is important for any lawyer, but is critical for prosecutors. Criminal law is constantly evolving through judicial decisions at the trial and appellate levels, as well as through changes to the *Criminal Code* and the NDA.

The DMP places a premium on training opportunities for members of the CMPS and, aside from the annual Continuing Legal Education (CLE) workshop, relies heavily on external organizations to fulfill much of its training requirements. The following sections describe those training opportunities undertaken by members of the CMPS as well as those training activities which were provided by members of the CMPS to other organizations.

## CMPS Continuing Legal Education Workshop

The CMPS CLE workshop is usually held concurrently with the JAG CLE workshop. Due to time constraints with the JAG CLE workshop during this reporting period, the CMPS has delayed its annual CLE workshop until the beginning of the next reporting period.



## External organizations

During this reporting period, RMPs participated in continuing legal education programs delivered by several organizations. These programs benefited the CAF not only through the knowledge imparted and skills developed, but also through the professional bonds developed by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

See Table 1-1 for a breakdown of training provided by external organizations for this reporting period.

## Training provided by the CMPS

The CMPS also provides support to the training activities of the OJAG and other CAF entities. During the reporting period, this support included the mentoring and supervision by RMPs of a number of junior legal officers from the OJAG who completed a portion of their “on the job training” by assisting at courts martial. The CMPS also provided support to military justice briefings given to JAG legal officers and military justice briefings offered by the Regional Services Division of the OJAG to other members of the CAF.

From time to time legal officers serving outside the CMPS may, with the approval of their supervisor and the DMP, participate in courts martial as “second chair” prosecutors. The objective of this program is “to contribute to the professional development of unit legal advisors as well as to improve the quality of prosecutions through greater local situational awareness”.<sup>4</sup>

TABLE 1-1: EXTERNAL TRAINING OPPORTUNITIES

Host Organization	Name of Course	Number of Attendees
Public Prosecution Service of Canada	School for Prosecutors Level 1	2
Public Prosecution Service of Canada	Written Advocacy Course	2
Ministry of Attorney General of Ontario – Sexual Violence Advisory Group	Prosecuting Sexual Assault: Law and Advocacy	10
Direction des poursuites criminelles et pénales du Québec	Cybercriminalité	1
Justice Canada	National Virtual Conference on Language Rights in Prosecutions	1
Nova Scotia Public Prosecution Service	Virtual Fall Conference	1
Siracusa International Institute for Criminal Justice and Human Rights	Specialization Course for Prosecutors	1
Alberta Law Enforcement Response Team	Firearms Crime Investigations and Prosecutions Conference	1
Canadian Bar Association	Myrna McCallum: Trauma Informed Lawyering and Advocacy	1

<sup>4</sup> The DMP and the Deputy Judge Advocate General Regional Services have an agreement whereby unit legal advisors may participate as second chairs to RMPs in preparation for and conduct of courts martial. Please see DMP Policy Directive #: 009/00 (<https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/communications-with-unit-legal-advisors.html>) for further information.

# TEMPORARY DUTY

The portability of the court martial system means that courts martial can occur anywhere in Canada or around the world. Unlike their civilian counterparts, military prosecutors are called upon to travel away from their home for significant periods of time to conduct courts martial and appeals, or to attend training events. Travel away from home – referred to as temporary duty (TD) – has a significant impact on the well-being of CMPS personnel and their families. This year, members of the CMPS were on TD for a total of 564 days. This is a significant increase in comparison to the last reporting period (from 146 to 564). This increase is attributable to the relaxation of travel restrictions associated with the COVID-19 pandemic, thus allowing proceedings to be held in person again.

Table 1-2 shows the breakdown of TD days by Region for this reporting period.

TABLE 1-2: CMPS TEMPORARY DUTY

Region	Court Martial Related TD	Appeal Related TD	Training Related TD	Other TD	Total TD
CMPS HQ	0	16	37	32	85
Atlantic	53	0	0	0	53
Eastern	93	0	0	0	93
Central	174	0	0	0	174
Western	71	0	0	0	71
Pacific	62	0	0	26	88
<b>Total</b>	<b>479</b>	<b>16</b>	<b>37</b>	<b>32</b>	<b>564<sup>5</sup></b>

5 The total number of TD days for this reporting period does not account for TD days spent by Regular Force prosecutors while following the Legal Officer Qualification Course (LOQC), which is a necessary training requirement for all legal officers in order to become occupationally qualified and provide legal services as members of the OJAG.

# CHAPTER

# MILITARY JUSTICE AND THE COURT MARTIAL SYSTEM

## INTRODUCTION

The nature of the operational missions entrusted to the CAF requires the maintenance of a high degree of discipline among CAF members. Parliament and the SCC have long recognized the importance of a separate military justice system to govern the conduct of individual soldiers, sailors, and air force personnel, and to prescribe punishment for disciplinary breaches. In 1980 and 1992, the SCC in *MacKay v the Queen*<sup>6</sup> and *R v Généreux*,<sup>7</sup> unequivocally upheld the need for military tribunals to exercise their jurisdiction in order to contribute to the maintenance of discipline and associated military values, as a matter of vital importance to the integrity of the CAF as a national institution.

These principles were unanimously reaffirmed by the SCC in 2015 in *R v Moriarity*: “I conclude that Parliament’s objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military.”<sup>8</sup> In *Moriarity*, the SCC also reinforced that “... the behavior of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base.”<sup>9</sup>

These views were directly in line with earlier comments by Chief Justice Lamer in *Généreux*, which noted that the Code of Service Discipline (CSD) “does not serve merely to regulate conduct that undermines such discipline and integrity. The CSD serves a public function as well by punishing specific conduct which threatens public order and welfare” and “recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve

6 *MacKay v the Queen*, [1980] 2 SCR 370 at paras 48 and 49.

7 *R v Généreux*, [1992] 1 SCR 259 at para 50 [*Généreux*].

8 *R v Moriarity*, 2015 SCC 55 at para 46.

9 *Ibid* at para 54.

the particular disciplinary needs of the military. In other words, criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale in the CAF. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.”<sup>10</sup>

Following *Moriarity*, the SCC delivered another unanimous decision related to the military justice system. In 2016, the SCC confirmed in the case of *R v Cawthorne*<sup>11</sup> that the authority conferred to the MND over appeals was in compliance with the *Canadian Charter of Rights and Freedoms (Charter)*. This decision was also important for all prosecution services across Canada, as the court touched upon the concept of prosecutorial independence and abuse of process.<sup>12</sup>



This case reinforced that the military justice system is a legitimate and respected partner, working in parallel with the criminal justice system within the broader Canadian legal mosaic.

On 26 July 2019, the SCC ruled yet again, in *R v Stillman*, that section 130(1)(a) of the NDA is constitutional, finding it consistent with section 11(f) of the *Charter*.<sup>13</sup> In its decision, the SCC seized the opportunity to summarize and affirm its prior jurisprudence relating to the military justice system. Among other things, the SCC referred to its decision in *Mackay v The Queen*, which recognized the constitutionality of section 130(1)(a) as a valid exercise of Parliament’s power under section 91(7) of the *Constitution Act, 1867*.<sup>14</sup> The SCC also reemphasized its decision in *Généreux*, which recognized the uniqueness of the military justice system as an essential mechanism to properly perform the public function of “maintaining discipline and integrity in the Canadian Armed Forces.”<sup>15</sup> Finally, the SCC upheld its decision in *Moriarity*, and refused to require a military nexus when charging a service member under section 130(1)(a) other than “the accused’s military status.”<sup>16</sup>

10 *Généreux*, supra note 2 at 281 and 293.

11 *R v Cawthorne*, 2016 SCC 32.

12 The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of British Columbia and the Director of Criminal and Penal Prosecutions of Quebec all intervened in this appeal to the SCC.

13 *R v Stillman*, 2019 SCC 40.

14 *Ibid* at paras 4 and 113 citing *Mackay v The Queen* at 397.

15 *Ibid* at paras 35, 36 and 55 citing *Généreux* at 293, 295, 297.

16 *Ibid* at paras 92 and 96.



# COURTS MARTIAL

Courts martial are formal military courts presided over by independent military judges. These tribunals are similar in nature to civilian criminal courts and are designed to deal predominantly with offences that are more serious in nature. Courts martial are conducted in accordance with rules and procedures similar to those followed in civilian criminal courts, while maintaining the military character of the proceedings. This chapter provides a basic overview of the court martial system. For further information regarding the court martial process, please refer to Table 2-1.

The court martial system has many features in common with the civilian justice system. For example, the *Charter* applies to both the military justice system as well as the civilian justice system. As such, in both systems of justice, the accused person is presumed innocent until the prosecution has proven the guilt of the accused beyond a reasonable doubt.

Additionally, courts martial are independent and impartial tribunals whose hearings are open to the public. Before a court martial takes place, it is announced in the Routine Orders of the base where it is to occur and the media is notified. Once a court martial is completed, the results are communicated publicly through a variety of means, including through social media.

TABLE 2-1: ADDITIONAL FACTS ABOUT THE COURT MARTIAL SYSTEM

Topic	Remarks
Purpose of the Military Justice System	The purpose of the military justice system is to contribute to the operational effectiveness of the CAF by maintaining discipline, efficiency, and morale.
Jurisdiction of the Military Justice System	Courts martial only have jurisdiction over those persons who are subject to the CSD. When a person joins the CAF, they remain subject to all Canadian laws, but also become subject to the CSD. Therefore, members of the CAF are subject to the concurrent jurisdiction of both the civilian and the military justice system.
Requirement for Pre-charge Legal Advice	In the majority of cases, the person authorized to lay a charge in the military justice system must first obtain pre-charge legal advice concerning the sufficiency of the evidence, whether or not a charge should be laid, and the appropriate charge.  Military prosecutors provide pre-charge legal advice to all cases investigated by the CFNIS. In some cases, military prosecutors will also assist legal officers with the OJAG by providing pre-charge legal advice in cases investigated by those members of the military police who are not a part of the CFNIS, as well as by unit investigators.
Custody Review Process	If a person is arrested under the CSD, they may be released by the person making the arrest or by a custody review officer. If the individual is not released, the matter will go before a military judge to determine if the individual is to be released, with or without conditions, or if they are to remain in custody. Military prosecutors represent the CAF at all custody review hearings which are held before a military judge.
Disclosure Obligations	Accused persons in the military justice system have the constitutional right to make full answer and defence. Therefore, military prosecutors must disclose all relevant information to the accused, including both inculpatory and exculpatory evidence, whether or not the prosecution intends to introduce it at court martial.
Sentencing	Under the NDA, military judges have a wide variety of sentencing options available for those members found guilty at court martial. Aside from fines and periods of imprisonment, which are also available in the civilian justice system, military judges are able to sentence offenders to dismissal with disgrace, dismissal, reprimands, detention, reduction in rank, and minor punishments.  In addition, new provisions added to the NDA, effective 1 September 2018, allowed military judges to grant absolute discharges, an order that the offender serve his or her sentence intermittently, as well as an order to suspend the execution of any sentences of imprisonment or detention.

Statutorily, pursuant to the section 179 of the NDA, courts martial have the same rights, powers, and privileges as superior courts of criminal jurisdiction with respect to all “matters necessary or proper for the due exercise of its jurisdiction,” including the attendance, swearing in, and examination of witnesses, the production and inspection of documents, and the enforcement of their orders.

There are two types of courts martial provided for under the NDA: General Courts Martial (GCM) and Standing Courts Martial (SCM). A GCM is comprised of a military judge and a panel of five CAF members. The panel is selected randomly by the Court Martial Administrator and is governed by rules that reinforce its military character. At a GCM, the panel serves as the trier of fact while the military judge makes all legal rulings and imposes the sentence. Panels must reach unanimous decisions on the ultimate finding as to whether or not an accused is guilty beyond a reasonable doubt.

An SCM is conducted by a military judge sitting alone, who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

At a court martial, the prosecution is conducted by a legal officer appointed by the DMP. In determining whether to prefer a matter for trial by court martial, military prosecutors must conduct a two-stage analysis. They must consider whether there is a reasonable prospect of conviction should the matter proceed to trial and whether the public interest requires that a prosecution be pursued. This test is consistent with those applied by Attorneys General throughout Canada and by prosecution agencies elsewhere in the Commonwealth.

In contrast with the public interest analysis applied elsewhere, the military justice must take additional factors into account, such as:

- the likely effect on public confidence in military discipline or the administration of military justice;
- the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence; and
- the effect on the maintenance of good order and discipline in the CAF, including the likely impact, if any, on military operations.

Information relating to these and other public interest factors comes, in part, from the commanding officer of the accused. The superior officer may also comment on public interest factors when the matter is referred to the DMP.

An accused person tried by court martial is entitled to legal representation by or under the supervision of the Director of Defence Counsel Services. This legal representation is provided to an accused person at no cost. An accused person may also choose to retain a lawyer at their own expense.

In most cases, the accused person has the right to choose between trial by GCM or SCM. However, for the most serious offences, a GCM will generally be convened while an SCM will be convened for less serious offences.

Both an offender convicted by court martial and the MND have a right to appeal court martial decisions to the CMAC, an appellate court comprised of civilian judges who are designated from the Federal Court of Canada and the Federal Court of Appeal, or appointed from the Superior Courts and Courts of Appeal of the provinces and territories.

CMAC decisions may be appealed to the SCC on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the SCC.



# CHAPTER

# YEAR IN REVIEW

# 3

The information and analysis provided below reflects the operations of the CMPS pertaining to pre-charge advice, referrals, post-charge reviews, courts martial, and custody review hearings over the course of the reporting period.

## OVERVIEW

The CMPS's total court martial caseload for the reporting period consisted of 105 files: 91 referrals were received during the reporting period and 14 files were carried over from the previous reporting period.

In addition, the CMPS managed 87 requests for pre-charge advice, twenty (20) appeals to the CMAC and six (6) appeals to the SCC, for a total of 218 files over the course of the current reporting period (pre-charge, referral and appeal files combined).

Military judges are, in certain circumstances, required to review orders made to retain a CAF member in service custody. The DMP represents the CAF at all such hearings. There were no custody review hearings during this reporting period.

Finally, a total of 48 courts martial were completed.

# THE COVID-19 PANDEMIC

The COVID-19 pandemic presented prosecution services across Canada with unprecedented challenges and limitations on bringing matters before the courts. The CMPS was able to quickly adapt to the new reality of prosecuting cases in the pandemic environment and has proven itself to be operationally focused and responsive. In this third year of the pandemic, courts martial continue to proceed safely and efficiently. The physical presence of parties and witnesses at court martial proceedings is starting to return to pre-pandemic levels, requiring RMPs to resume their travel across Canada. Successfully prosecuting cases in the new COVID-19 environment has demonstrated that the CMPS is a small, but highly adaptable and agile component of the military justice system, which can achieve desired outcomes in any environment.

## IMPACT OF RECOMMENDATIONS MADE BY REVIEW AUTHORITIES

On 29 April 2021, the MND appointed former Supreme Court Justice, the Honorable Madame Louise Arbour, to conduct an independent and comprehensive review of sexual misconduct in the CAF. The terms of reference provided the authority for Madame Arbour to issue any interim recommendations to address issues for immediate action that may become apparent during the conduct of the review.

On 30 April 2021, The Honorable Mr. Morris J. Fish tabled his Report of the Third Independent Review Authority to the MND, who made a total of 107 recommendations including a number of recommendations regarding the independence of military justice actors and how sexual misconduct should be addressed in the military justice system.

On 20 October 2021, Madame Arbour issued an interim recommendation to implement recommendation 68

of Mr. Morris J. Fish and to immediately transfer to civilian police forces all cases involving sexual assaults and other offences of a sexual nature under the *Criminal Code*, including allegations that were under investigation by the CFNIS, and in all cases, that charges be laid in civilian courts. This interim recommendation focused on cases that were at the pre-charge stage.

On 5 November 2021, the Canadian Forces Provost Marshal (CFPM) and the DMP issued a joint statement indicating their acceptance of Madame Arbour's interim recommendation.

On 26 November 2021, the DMP issued an interim direction to his RMPs regarding the implementation of Madame Arbour's interim recommendation. The DMP provided clear direction as to how to manage cases involving sexual assaults and other offences of a sexual nature under the *Criminal Code* that had already been referred to the DMP for disposal, or were in the process of being referred to the DMP. At the time of Madame Arbour's interim recommendation, the CMPS had a total of 33 such cases.

Meetings with complainants in all of the 33 cases were conducted in accordance with the DMP's interim direction in order to explain the effects of Madame Arbour's interim recommendation and seek their views as to jurisdiction. In all but two cases, complainants indicated their preference for the matters to continue to proceed within the military justice system.

For this reason, while the CMPS has stopped accepting new cases involving sexual assaults and other offences of a sexual nature under the *Criminal Code* since Madame Arbour's interim recommendation, RMPs will nevertheless continue to conduct courts martial involving this type of offence over the course of the next reporting period.

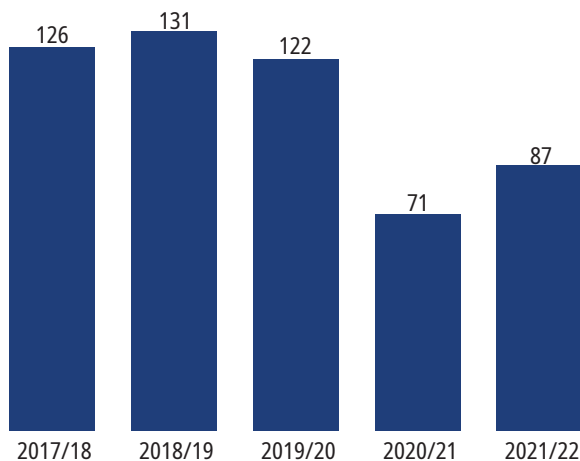
## PRE-CHARGE ADVICE

RMPs within the CMPS are responsible to provide pre-charge advice to both the CFNIS<sup>17</sup> and to unit legal advisors.<sup>18</sup> In this reporting period, 91 requests for pre-charge advice were sent to the CMPS and 9 requests had been pending from the previous reporting period. Of the 100 total requests, 87 pre-charge advice files were completed during this reporting period, leaving 13 files still pending at the end of the current reporting period.

The number of completed pre-charge advice files is lower than the average number of completed files over the past four reporting periods (105). It is likely that the pandemic had a direct impact on the amount of requests for pre-charge received by CMPS during the reporting period. It is anticipated that as pandemic restrictions subside, and the CAF returns to normal operational activities, the number of requests for pre-charge advice will increase.

Figure 3-1 shows the number of completed pre-charge files for the last four reporting periods.

**FIGURE 3-1:  
NUMBER OF COMPLETED PRE-CHARGE FILES BY REPORTING PERIOD**



## REFERRALS AND POST-CHARGE REVIEWS

### Number of Referrals Received During the Reporting Period

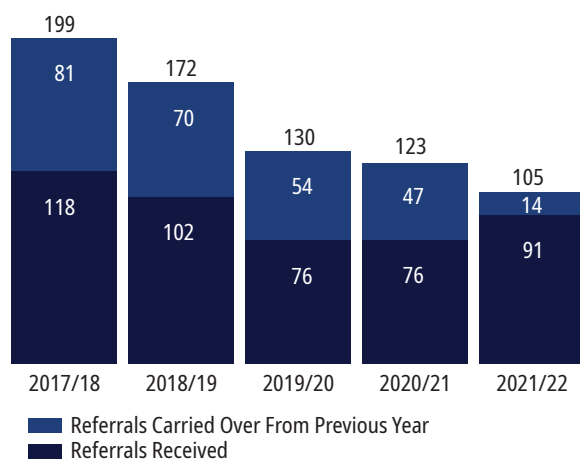
During this reporting period, 91 referrals were received by the DMP. This is an increase of 15 referrals in comparison to the last reporting period (from 76 to 91).

### Caseload for the Reporting Period

When combined with the 14 files that were carried over from the previous reporting period, the caseload for this reporting period was 105 files.<sup>19</sup>

Figure 3-2 shows the number of files handled for the past five reporting periods.

**FIGURE 3-2:  
CASELOAD BY REPORTING PERIOD**



17 DMP Policy Directive 002/99: Pre-Charge Screening - <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html>

18 JAG Policy Directive 048/18 – Pre-Charge Screening requires unit legal advisors to seek the opinion of a prosecutor for pre-charge advice when the evidence reasonably supports the conclusion that a charge will not proceed by way of summary trial but is likely to be referred for trial by court martial.

19 Carried over files are files that were not closed at the end of the previous reporting period, that is, files where one or more charges had already been preferred, but the court martial had not yet commenced, and files that still required a post-charge decision as of the end of the previous reporting period.

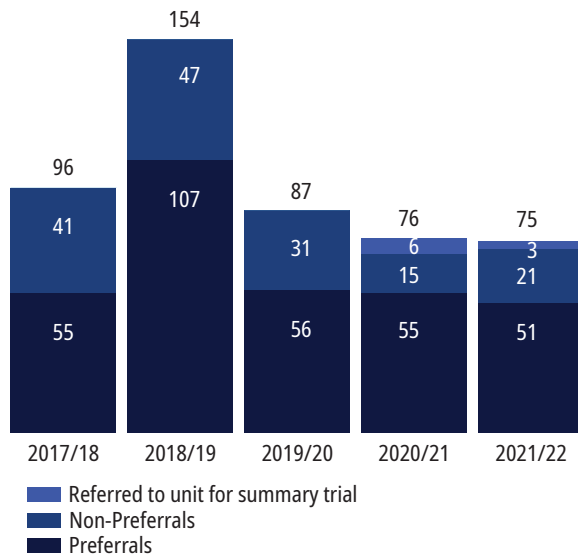
## Preferrals, Non-Preferrals and Referral of Charges to Unit for Summary Trial

During this reporting period, post-charge decisions were made by an RMP in 75 files, while 30 files were still pending a prosecutorial decision at the end of the current reporting period.

Of the 75 completed files, 51 files led to one or more charges being preferred for court martial, 21 files were not preferred and three (3) files were referred back to the originating unit to try the accused person by summary trial. The preferal rate for this reporting period is 68%.

Figure 3-3 shows the number of preferals, non-preferals and referral of charge to unit for summary trial for the past five reporting periods.

**FIGURE 3-3:  
NUMBER OF PREFERALS AND NON-PREFERALS BY REPORTING PERIOD**



## Preferral Rates by Investigative Agency

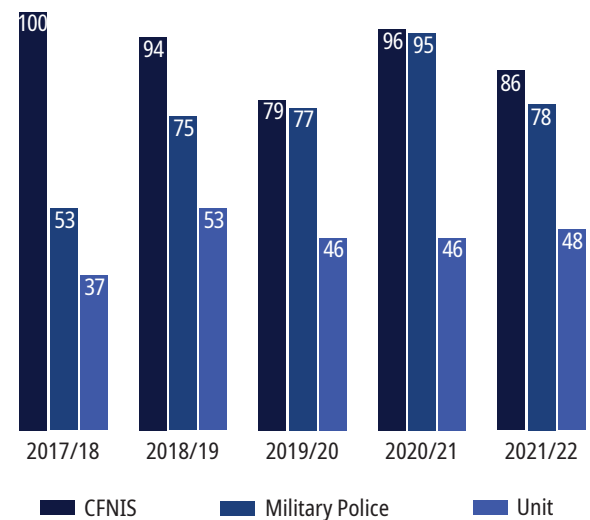
Although all files referred to the DMP are received through a referral authority, the incident giving rise to the charge may be investigated by one of three military investigative agencies: the CFNIS, an investigator with the military police who is not a member of the CFNIS, or a unit investigator. As such, the rate of preferals varies between investigative agencies as their investigators have different levels of experience, proficiency and training.

During this reporting period, the preferal rate for those files investigated by the CFNIS was 86%. This preferal rate is slightly higher than that of the regular military police (78%), but is markedly higher than that of unit investigators (48%).<sup>20</sup>

This divergence of preferal rates has been consistent over the past several years, with those investigations conducted by the CFNIS being preferred at a higher rate than unit investigators.

For a complete overview of preferal rates by investigative agency over the past five reporting periods, please refer to Figure 3-4.

**FIGURE 3-4:  
PREFERAL RATES BY INVESTIGATIVE AGENCY AND BY REPORTING PERIOD**



<sup>20</sup> The lower preferal rate for the unit investigators this reporting period is slightly skewed by three cases where a decision has been made to refer the charge for disposal by an officer who has jurisdiction to try the accused person by summary trial pursuant to section 165.13 of the NDA.



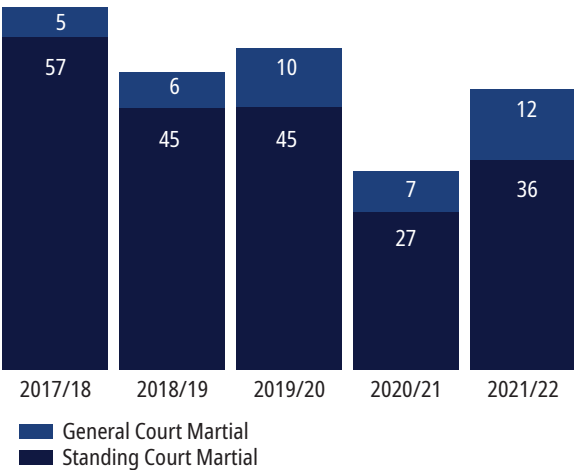
# COURTS MARTIAL

This section provides an overview and analysis of cases heard at a court martial during the reporting period. For a complete list of all courts martial heard during the reporting period, please refer to Annex A.

## Number of Courts Martial

A total of 48 courts martial were completed during this reporting period. Of those, 36 were SCMs and 12 were GCMs. There has been an increase in comparison to the last reporting period and the annual number of courts martial appears to be returning to normal historical levels, likely associated with the relaxation of restrictions associated with the COVID-19 pandemic.

FIGURE 3-5:  
NUMBER OF COURTS MARTIAL BY TYPE AND BY REPORTING PERIOD



# NOTABLE COURT MARTIAL CASES

This section provides a summary of notable courts martial that were held during this reporting period. Please refer to Annex A for an overview of all the courts martial held during this reporting period.

## R v Pte August

Pte August was charged with three counts of sexual assault and was found guilty of two of the charges. He was ultimately sentenced to imprisonment for six months (the carrying into effect of the punishment of imprisonment has been suspended) following a very long trial, marked by a myriad of adjournments. The trial commenced on 13 August 2018 and was finally concluded on 18 February 2022.

The case for the prosecution was heard during the week of 13 August 2018. At the close of the prosecution case, the accused, through his counsel, presented a motion of no prima facie case on the first charge. The motion was granted and resulted in a finding of not guilty on that charge. This left the court with two charges to deal with instead of three. The case was then adjourned to 22 October 2018 for the presentation of the case for the defence.

Unfortunately, the trial was further delayed following the decision in *R v Beaudry*, 2018 CMAC 4 delivered on 19 September 2018, which declared s. 130(1)(a) of the NDA to be of no force or effect in its application to any civil offence for which the maximum sentence is five years or more. The Supreme Court of Canada overturned *Beaudry* on 26 July 2019 and confirmed the constitutional validity of s. 130(1)(a) of the NDA. While this decision technically allowed the court martial to resume, the case was further adjourned to 20 April 2020 due to unavailability of defence counsel until then. Before the case could resume, the COVID-19 pandemic led to a suspension of all court martial activities from 16 March 2020 to 31 May 2020.

The defence presented its case between 21 and 31 July 2020 and raised a defence of automatism, positing that the accused was in a state of parasomnia during the alleged offence. The defence called expert evidence in support of this claim. A second expert was also called by the prosecution and authorized by the Court to

provide expert opinion evidence on sleep disorders. He concluded that the results of the tests conducted by the expert called by the defence would have been sufficient to make a diagnosis of sleepwalking, but insufficient to reveal anything about what could have occurred on the morning of the incidents or at any other specific time in the past.

The parties delivered their submissions on finding between 5 and 7 August 2020. On 30 April 2021, the court found the accused guilty on the two remaining charges.

As a result of additional requests for adjournments presented by the defence, sentencing was delayed to 14 February 2022. The sentence was pronounced on 18 February 2022.

### ***R v Bdr Cogswell***

Bdr Cogswell was found guilty of one charge laid pursuant to s. 93 of the NDA (disgraceful conduct) and of eight charges laid pursuant to s. 130 of the NDA for having administered a noxious thing contrary to s. 245(1)(b) of the *Criminal Code*.

On 21 July 2018, Bdr Cogswell, known as Bdr Fraser at the time of the alleged incident, distributed a dozen cupcakes she had baked and laced with cannabis while she was working at the mobile canteen. Bdr Cogswell was responsible for manning and supporting a mobile canteen that provided snacks and supplies to the soldiers while in the field.

The members who consumed the cupcakes unaware that they contained cannabis were all scheduled to conduct the live fire portion of Exercise COMMON GUNNER at Canadian Forces Base Gagetown, New Brunswick. Shortly after receiving the cupcakes from Bdr Cogswell, the complainants experienced symptoms to varying degrees, all consistent with the ingestion of cannabis.

Bdr Cogswell was sentenced to imprisonment for a period of 30 days, dismissal from Her Majesty's service and a reduction in rank to the rank of Gnr. The court outlined many aggravating factors, including the serious safety risk arising from the surreptitious distribution of cannabis during a live artillery range, the effect on the eight innocent victims, the violation of their personal integrity they felt, the degree of premeditation and the offender's attempt to inculcate other innocent personnel during the investigation to exculpate herself.

### ***R v Pte Waugh***

Pte Waugh was found not responsible on account of mental disorder on one charge of sexual assault contrary to s. 271 of the *Criminal Code*, an offence punishable under s. 130 of the NDA. This is a rare case where the evidence in support of the contention that Pte Waugh was in a state of automatism, namely parasomnia, was so compelling that it led the prosecution to not oppose the theory of the defence. The court determined that it should not hold a disposition hearing pursuant to s. 202.15(1) of the NDA, and referred the case to the appropriate review board for disposition.

### ***R v MS Machtmes***

MS Machtmes was found guilty of three charges. His unfortunate death following the finding of guilt of the GCM led to an abatement of the proceedings before sentencing could take place.

Two of the charges were laid contrary to s. 130 of the NDA, that is to say, for luring a child, contrary to s. 172.1(1)(b) of the *Criminal Code* and invitation to sexual touching, contrary to s. 152 of the *Criminal Code*. The third charge involved an allegation of disgraceful conduct, contrary to s. 93 of the NDA.

All charges stemmed from a series of sexualized conversations via social media with a fifteen-year old Australian citizen, initiated by MS Machtmes while he was deployed on operations off the coast of Australia.

The court martial proceeded during the COVID-19 restrictions. Following an application by the prosecution, and despite the objection of the defence, the court allowed the four Australian witnesses called by the prosecution to testify via video-link. The court relied on s. 179(1)(a) of the NDA, which provides a court martial with the ability to control its own processes with respect to the attendance, swearing and examination of witnesses.

The court determined that testimony via video-link was the most appropriate means to elicit the truth from the Australian witnesses, in light of the severe restrictions on travel that were in place at the time. The court preferred the video-link to the other option, which would have involved the taking of evidence on commission pursuant to s. 184 of the NDA. The court deemed that the video-link was the means that would more appropriately serve the interests of the accused.

# COURT MARTIAL APPEAL COURT

The appeal section of the CMPS was busy during the year. For the complete list of the cases heard and ongoing at the CMAC throughout the year, please consult Annex B. For the list of SCC cases, please consult Annex C.

Two cases were particularly notable given the importance of the issues they raised: *McGregor* and *Edwards et al.*

## Decisions Rendered or Appeals Initiated at the CMAC

### *R v McGregor*, 2020 CMAC 8

Following the CMAC decision in *McGregor* on 31 December 2020, Cpl McGregor sought leave to appeal at the SCC. Leave was granted on 14 October 2021.

At his SCM, Cpl McGregor was found guilty of sexual assault under s. 130 of the NDA (contrary to s. 271 of the *Criminal Code*); of two counts of voyeurism under s. 130 of the NDA (contrary to s. 162(1) of the *Criminal Code*); of one count of possession of a device for surreptitious interception of private communications under s. 130 of the NDA (contrary to s. 191(1) of the *Criminal Code*); of one count of cruel or disgraceful conduct, contrary to s. 93 of the NDA; and, of one count of conduct to the prejudice of good order and discipline, contrary to s. 129 of the NDA. He was sentenced to imprisonment for a period of 36 months and dismissal with disgrace from Her Majesty's service.

The main issue in this case is whether or not s. 8 of the *Charter* found application with regard to the search of Cpl McGregor's residence in the State of Virginia, USA.

This case is interesting for the military justice system since it highlights its differences from any other Canadian jurisdiction. Normally, the *Charter* does not find application outside Canada since Parliament does not have, in general, the jurisdiction to enforce Canadian laws in foreign states.

This means, for instance, that accused are prohibited, at their trial, to seek the exclusion of evidence seized

outside Canada under s. 24(2) of the *Charter*. Though such accused can nonetheless request for that evidence to be excluded if its admission renders his or her trial unfair pursuant to ss. 7 and 11(d) of the *Charter*.

Since the CSD (which is embedded in the NDA) operates outside Canada, the *Charter* does find application when it is enforced on a foreign territory. Such jurisdiction comes either from the consent of the host nation or under the umbrella of Canada's obligation under international law to maintain control over its forces. It is an example, as alluded to in *R v Hape*, 2017 SCC 26, of a rare instance where the *Charter* will apply abroad with another country's permission or by the action of another permissive rule of international law.

In the case of Cpl McGregor, Canada's enforcement jurisdiction came from the North Atlantic Treaty Organisation – Status of Forces Agreement (NATO SOFA), of which both the US and Canada are signatories. This agreement provided military investigators complete jurisdiction over Cpl McGregor. However, by the terms of the NATO SOFA, Cpl McGregor's residence, by its location, fell outside the reach of the direct enforcement powers of the CAF. Military investigators had to seek assistance, and obtain a warrant, from US authorities.

Cpl McGregor claims that the search of his home in Virginia, US, and the subsequent seizure and search of his electronics devices, though authorized by a US warrant, was unlawful and in breach of s. 8 of the *Charter*. This proposition was dismissed by the Military Judge and the CMAC.

The MND, for Her Majesty in this appeal, claims that while the *Charter* applied to every other investigative step on that file, it did not, and could not, apply to the search of Cpl McGregor's residence since the search, conducted under Virginia law, was not a "matter within the authority of Parliament" (i.e., s. 32 of the *Charter*).

The hearing took place on 19 May 2022 and the SCC reserved its decision.

# SUPREME COURT OF CANADA

## Decisions Rendered

There were no decisions rendered by the SCC in the course of this reporting period.

## Applications for leave to appeal to the

### Independence and Impartiality of Military Tribunals

As it was reported last year, a series of court martial decisions pertaining to the independence and impartiality of our military tribunals under s. 11(d) of the *Charter* were appealed by the DMP. These appeals were allowed by the CMAC and new trials were ordered for several accused on 11 June 2021 (*Edwards et al.*, 2021 CMAC 2).

On 10 September 2021, the accused in *Edwards et al.* sought leave to appeal to the SCC. Since then, several other military accused have sought leave from the SCC on the same grounds: *R v Proulx and Cloutier*, 2021 CMAC 3; *R v Christmas*, 2022 CMAC 1; *R v Brown*, 2022 CMAC 2; *R v Thibault*, 2022 CMAC 3.

The SCC has yet to decide if leave will be granted.



# CHAPTER

# COMMUNICATION AND OUTREACH

Communication and outreach activities play a vital role in the legitimization of Canada's military justice system. From key players in the military justice process, as well as national and international strategic partners and organizations, communication and outreach activities form an integral part of the DMP's strategic view to promoting Canada's military justice system. In that regard, the DMP has made a concerted effort to engage a number of organizations to further enhance the legitimacy of Canada's military justice system. This Chapter sets out those communications and outreach activities by the DMP over the course of the current reporting period.

## CAF CHAIN OF COMMAND

The military justice system is designed to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency, and morale. It also ensures that justice is administered fairly and with respect for the rule of law. As the military justice system is one of several tools available to the chain of command in order to help it reach these objectives, it is imperative that the DMP, and prosecutors within the CMPS, actively and effectively engage the chain of command throughout the court martial process.

Recent amendments to the NDA have expressly recognized principles and purposes of sentencing within the military justice system distinct from the sentencing regime within the civilian criminal justice system, along with unique military factors that must be taken into consideration in sentencing, such as the effect the offence had on the conduct of a military operation. In order for CMPS to fulfil its role, it is important for prosecutors to understand the context in which CAF units and

formations are operating, and their needs in relation to the maintenance of discipline, efficiency, and morale.

While protecting the prosecutorial independence of the CMPS, the DMP recognizes the importance of maintaining collaborative relationships with the CAF chain of command. Collaborative relationships with the chain of command ensure that both entities work together to strengthen discipline and operational efficiency through a robust military justice system. Despite the constraints related to the COVID-19 pandemic, RMPs made sure to keep regular communication with senior members of the chain of command on the various military bases in Canada during this reporting period, in accordance with the instructions of the DMP.

## CFNIS

The CFNIS was established in 1997 with a mandate to investigate serious and sensitive matters related to DND and the CAF. It performs a function similar to that of a major crimes unit of the RCMP or large municipal police agency. It is important for all prosecutors to maintain a strong relationship with investigative agencies, while at the same time respecting the independence of each organization. Good relationships with investigative agencies ensure that the prosecutor and the investigator exercise their respective roles independently but cooperatively, and help to maximize the effectiveness and efficiency of the CMPS as a prosecution service.

Over the course of this reporting period, the Senior Counsel, a defence counsel from the DDCS, and the CFNIS Legal Advisor, presented at the CFNIS Indoctrination Course for new investigators, and they also participated in a panel discussion. Their presentations and discussions enhanced the knowledge of the military justice system for the new CFNIS investigators, particularly in relation to the prosecutions of sexual offences.

## FEDERAL, PROVINCIAL AND TERRITORIAL HEADS OF PROSECUTIONS COMMITTEE

The Federal, Provincial and Territorial Heads of Prosecutions (HoP) Committee was established in 1995. The Committee is made up of the heads of each of Canada's 12 prosecution agencies. This includes the heads of prosecution for the ten provincial prosecution services, as well as the Director of Public Prosecutions for the Public Prosecution Service of Canada, and the DMP. The mandate of the HoP Committee is to serve as a national forum for the discussion of prosecutions and prosecution-related issues, and to facilitate the exchange of information and best practices on legal and managerial issues among the prosecution services of Canada. Since its inception, the Committee has helped promote assistance and cooperation among prosecution services and facilitated the coordination of national prosecution issues and the adoption of consistent prosecution positions on those issues whenever possible. The HoP Committee also serves as a national advisory body on prosecution issues in Canada, providing a venue where stakeholders can consult and seek the views of the Canadian prosecution community.<sup>21</sup>

During this reporting period, the Acting DMP attended virtually the HoP Committee Spring general meeting, which was held from 1-4 May 2021. The DMP attended in person the HoP Committee Fall general meeting, which was held in Charlottetown, PEI, on 17-18 November 2021.

The DMP and his DDMP Ops also attended virtually an ad hoc general meeting on 17 September 2021, for the purpose of establishing a working group to address the exercise of concurrent jurisdiction over offences committed by members of the CAF, in response to recommendations 19 and 20 made by Mr. Morris J. Fish in his Report of the Third Independent Review Authority to the MND.

---

<sup>21</sup> <https://www.ppsc-sppc.gc.ca/eng/tra/tr/05.html>.



# CMAC EDUCATION SEMINAR

Due to the Omicron wave of the COVID-19 pandemic and a need to reduce the number of attendees accordingly, the DMP did not have the opportunity to present at the CMAC Education Seminar. The CMAC Education Seminar is an annual legal education seminar conducted for judges assigned to the CMAC, organized by the Canadian Judicial Council.

# NATIONAL CRIMINAL LAW PROGRAM

The National Criminal Law Program (NCLP)<sup>22</sup> is delivered by the Federation of Law Societies of Canada, and is the largest criminal law conference in Canada. The 47<sup>th</sup> Annual NCLP was supposed to be held in Victoria, British Columbia, in July 2020, but was canceled due to the COVID-19 pandemic. The 47<sup>th</sup> Annual NCLP will now be held in Victoria in July 2022 and the DMP, the members of the CMPS HQs, and Senior RMPs from the Regional Prosecution offices will attend in person.



<sup>22</sup> <https://flsc.ca/national-initiatives/national-criminal-law-program>.

# CHAPTER

# CASE MANAGEMENT SYSTEM

# 5

The CMPS Case Management System (CMS) launched on 1 June 2018. The CMS is a file management tool and database used to monitor the progress of all cases referred to the DMP through the court martial process. In addition, it provides the DMP with statistics in real time about all cases proceeding through the court martial system.

The CMS tracks the status of files and collects data at the pre-charge, referral, post-charge, pre-trial, and trial stages. All important dates associated with these files are recorded in the CMS including, but not limited to, the dates when the file was referred to the DMP, when the file was assigned to a prosecutor, the date of the decision of the prosecutor on whether or not to prefer charges, and key dates in the court martial process.

The CMS continues to be improved through an iterative development process. The newest version of CMS was released during this reporting period and work continues to be done for additional improvements. The next main effort will involve ensuring that CMS fully adapts to the implementation of Bill C-77, which will change key aspects of the process, including the removal of the referral authority and the referral of charges from the charge layer directly to the DMP.

# CHAPTER

# FINANCIAL INFORMATION

## OPERATING BUDGET

The DMP's operating budget is allocated primarily to operations and is divided into four main categories: Regular Force Operations and Maintenance, Civilian Salary and Wages, Reserve Force Pay, and Reserve Force Operations and Maintenance. Operations and Maintenance includes items such as travel, training costs, general office expenditures, and other costs that support personnel and maintain equipment, but does not include costs associated with a specific court martial. A complete overview of the DMP's budget, including initial allocation and expenditures, can be found at Table 6-1.

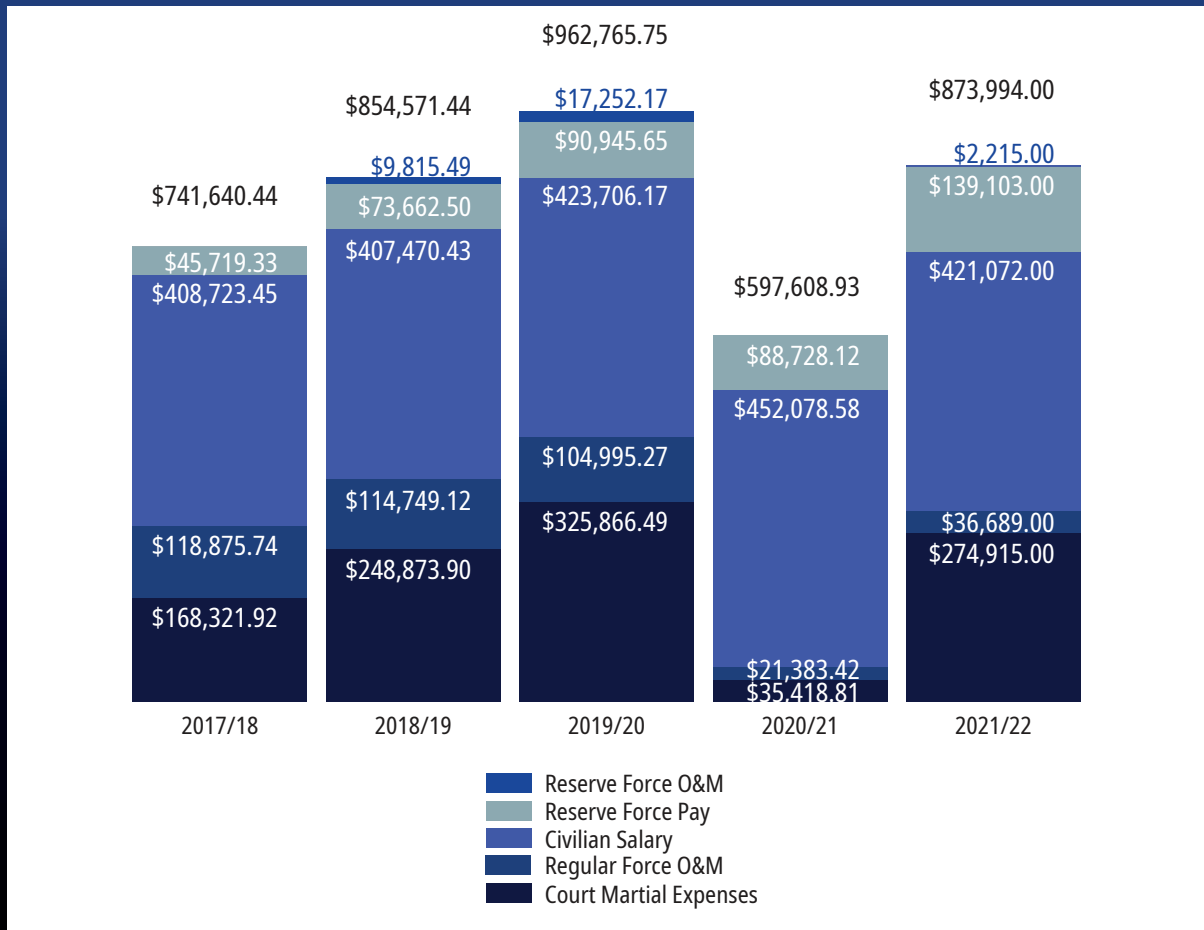
TABLE 6-1: SUMMARY OF DMP'S OPERATING BUDGET

Fund	Initial Allocation	Expenditures	Balance
Regular Force Operations & Maintenance	\$139,000.00	\$36,688.91	\$102,311.09
Civilian Salary & Wages	\$442,000.00	\$421,071.66	\$20,928.34
Reserve Force Pay	\$100,000.00	\$139,103.66	(\$39,103.66)
Reserve Force Operation and Maintenance	\$34,000.00	\$2,214.56	\$31,785.44
Expenditures for courts martial	300,000.00	274,915.27	25,084.73
<b>Totals</b>	<b>\$1,015,000.00</b>	<b>\$873,994.06</b>	<b>\$141,005.94</b>

Courts martial expenses have been administered through a centralized fund. Due to various factors, such as the number of courts martial, the duration of courts martial, as well as unpredictable expenses, including the requirement for expert witnesses, court martial expenditures can vary greatly from one reporting period to the next. This reporting period, the total amount of CMPS expenditures for courts martial was \$274,915.27.

Figure 6-1 shows the DMP's operating budget over the last five reporting periods.

FIGURE 6-1: DMP'S OPERATING BUDGET – 2017/18 TO 2021/22





# ANNEXES



# ANNEX A: COURTS MARTIAL

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
MCpl Anderson	SCM	114 NDA	Stealing	Not guilty	Reprimand and a fine of \$300	Cold Lake, AB	04 Oct 21	English	
		114 NDA	Stealing	Guilty					
		114 NDA	Stealing	Guilty					
Pte Andrian	SCM	129 NDA	Neglect to the Prejudice of Good Order and Discipline	Guilty	Fine of \$2,500	Hamilton, ON	20 Aug 21	English	
Pte August	SCM	130 NDA (271 CC)	Sexual Assault	Not guilty	Imprisonment for 6 months (suspended)	Gatineau, QC / Gagetown, NB	18 Feb 22	English	
		130 NDA (271 CC)	Sexual Assault	Guilty					
		130 NDA (271 CC)	Sexual Assault	Guilty					
MS Barber	SCM	83 NDA	Disobedience of Lawful Command	Stay of proceedings	Fine of \$600	Victoria, BC	07 Mar 22	English	
		83 NDA	Disobedience of Lawful Command	Stay of proceedings					
		83 NDA	Disobedience of Lawful Command	Not guilty					
		85 NDA	Behaved with Contempt Toward a Superior Officer	Not guilty					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty					
OCdt Bobu	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty	Confinement to barracks for 14 days	St-Jean-sur-Richelieu, QC	21 May 21	French	
Cpl Brandt	SCM	129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty	Fine of \$200 and 10 days of extra work and drill	Halifax, NS	28 Mar 22	English	
S1 Brenton	GCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Halifax, NS	03 Aug 21	English	
		130 NDA (271 CC)	Sexual Assault	Not guilty					
		93 NDA	Behaved in a Disgraceful Manner	Withdrawn					
		83 NDA	Disobedience of Lawful Command	Withdrawn					
Lt(N) Brown	SCM	130 NDA (271 CC)	Sexual Assault	Stay of proceedings		Halifax, NS	23 March 2021	English	Yes
		130 NDA (279(2) CC)	Forcible Confinement	Stay of proceedings					

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
Pte Bruyère	GCM	130 NDA (267(b) CC)	Assault Causing Bodily Harm	Guilty of lesser and included offence (s. 266)	Severe reprimand and a fine of \$3,000	Valcartier, QC	25 Feb 22	French	Yes
		130 NDA (266 CC)	Assault	Withdrawn					
		86(a) NDA	Fought with a Person Subject to the Code of Service Discipline	Guilty					
		97 NDA	Drunkenness	Withdrawn					
Sgt Buist	GCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Ottawa, ON	12 Nov 21	English	
Lt(N) Chami	GCM	129 NDA	Neglect to the Prejudice of Good Order and Discipline	Guilty	Severe reprimand and a fine of \$3,600	Gatineau, QC	25 Jan 22	French	
MCpl Chand	GCM	130 NDA (272(2)(b) CC)	Sexual Assault Causing Bodily Harm	Not guilty		Toronto, ON	01 Jun 21	English	
		130 NDA (271 CC)	Sexual Assault	Not guilty					
		130 NDA (279(2) CC)	Forcible Confinement	Not guilty					
		130 NDA (372(3) CC)	Harassing Communications	Withdrawn					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Withdrawn					

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
Bdr Cogswell	SCM	93 NDA	Behaved in a Disgraceful Manner	Guilty	Imprisonment for 30 days, dismissal and a reduction in rank to Gnr	Gagetown, NB	19 Nov 21	English	Yes
		129 NDA	An Act to the Prejudice of Good Order and Discipline	Stay of proceedings					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		130 NDA (245(1)(b) CC)	Administering Noxious Thing	Guilty					
		Sgt Cousineau	SCM	130 NDA (271 CC)					
93 NDA	Behaved in a Disgraceful Manner			Guilty					

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
Cpl Crouter	SCM	129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty	Fine of \$200 and 7 days of extra work and drill	Halifax, NS	28 Mar 22	English	
Sgt Curativo	SCM	95 NDA	Abuse of Subordinates	Guilty	Detention for 7 days and a fine of \$2,000	Wainwright, AB	05 Oct 21	English	
Capt D'Arcy	SCM	109 NDA	Low Flying	Withdrawn	Reprimand	Comox, BC	27 Apr 21	English	
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty					
Cpl Edmonstone	SCM	130 NDA (430(3) CC)	Mischief	Guilty	Reduction in rank to Pte and a fine of \$3,000	Edmonton, AB	12 Nov 21	English	
		90 NDA	Absence without Leave	Guilty					
Cpl Euler	SCM	93 NDA	Behaved in a Disgraceful Manner	Not guilty		Halifax, NS	29 Apr 21	English	Yes
		95 NDA	Abuse of Subordinates	Not guilty					
Pte Ermine	SCM	130 NDA (266 CC)	Assault	Withdrawn	Confinement to barracks for 15 days	Wainwright, AB	29 Jul 21	English	
		97 NDA	Drunkness	Guilty					
Lt(N) Fields	SCM	130 NDA (271 CC)	Sexual Assault	Withdrawn	Severe reprimand and a fine of \$5,000	Halifax, NS	16 Feb 22	English	
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
Cpl Fortin	SCM	84 NDA	Struck a Superior Officer	Withdrawn	Severe reprimand and a fine of \$200	Bagotville, QC	05 Jul 21	French	
		101.1 NDA	Failure to Comply with Conditions	Withdrawn					
		85 NDA	Used Threatening Language To a Superior Officer	Withdrawn					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty					
MCpl Herd	SCM	112(b) NDA	Unauthorized Use of Vehicles	Guilty	Fine of \$200	Toronto, ON	21 Sep 21	English	
		112(b) NDA	Unauthorized Use of Vehicles	Withdrawn					
Cpl Howe	GCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Kingston, ON	22 Oct 21	English	
Pte Johnston	GCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Petawawa, ON	25 Nov 21	English	

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
MS Machtnes	GCM	130 NDA (172.1(1) (b) CC)	Luring a Child	Guilty	Abatement to proceedings due to unexpected death of offender	Victoria, BC	12 May 21	English	
		130 NDA (152 CC)	Invitation to Sexual Touching	Guilty					
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
Pte MacKenzie	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty	Fine of \$2790 and confinement to barracks for 21 days	Borden, ON	18 May 21	English	
MWO MacPherson	GCM	130 NDA (271 CC)	Sexual Assault	Stay of proceedings		Gatineau, QC	20 Jul 21	English	Yes
MWO MacPherson	GCM	s.130 (s.266 CC)	Assault	Stay of proceedings	Severe reprimand and fine of \$1,000	Kingston, ON	19 Oct 21	English	
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty					
LCol Mainguy	SCM	130 NDA (266 CC)	Assault	Not Guilty		Borden, ON	11 Feb 22	English	
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Not Guilty					
Bdr Malikov	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty	Fine of \$1,000	Petawawa, ON	31 Aug 21	English	
MS Manuel	SCM	114 NDA	Stealing When Entrusted	Guilty	Severe reprimand and a fine of \$5,000	Halifax, NS	22 Nov 21	English	
		117(f) NDA	An Act of a Fraudulent Nature	Guilty					
S1 Marshall	SCM	130 NDA (271 CC)	Sexual Assault	Withdrawn	Imprisonment for 60 days	Halifax, NS	30 Mar 22	English	
		130 NDA (271 CC)	Sexual Assault	Withdrawn					
		130 NDA (271 CC)	Sexual Assault	Withdrawn					
		130 NDA (271 CC)	Sexual Assault	Withdrawn					
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
		93 NDA	Behaved in a Disgraceful Manner	Guilty					
		95 NDA	Abuse of Subordinates	Guilty					
Maj Martimbeault	SCM	117(f) NDA	An Act of a Fraudulent Nature	Guilty	Reduction in rank to Capt	Montreal, QC	22 Mar 22	French	

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
Capt Osborne	SCM	129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty	Reprimand and a fine of \$3,500	Moncton, NB	10 May 21	English	
		129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty					
Cpl Palmer	GCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Kingston, ON	10 Dec 21	English	
		130 NDA (271 CC)	Sexual Assault	Not guilty					
		130 NDA (271 CC)	Sexual Assault	Not guilty					
MCpl Pinto	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Not Guilty		Victoria, BC	30 Jul 21	English	
MCpl Radewych	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Not guilty		Toronto, ON	23 Feb 22	English	
		95 NDA	Abuse of Subordinates	Not guilty					
Cpl Redmond	SCM	130 NDA (10(1) Cannabis Act)	Selling Cannabis without Authorization	Guilty	Imprisonment for 21 days, severe reprimand and a fine of \$4,000	Halifax, NS	29 Mar 22	English	
		130 NDA (10(2) Cannabis Act)	Possessing Cannabis for the Purpose of Selling	Guilty					
		130 NDA (5(1) CDSA)	Trafficking	Guilty					
		130 NDA (17(1) Cannabis Act)	Promotion of Cannabis	Withdrawn					
		130 NDA (8(1)(b) Cannabis Act)	Possessing Cannabis that They Knew to be Illicit	Withdrawn					
Cpl Reid	SCM	93 NDA	Behaved in a Disgraceful Manner	Not guilty	Reprimand and a fine of \$1,500	Edmonton, AB	04 Feb 21	English	
		95 NDA	Abuse of Subordinates	Guilty					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Not guilty					
		129 NDA	Conduct to the Prejudice of Good Order and Discipline	Not guilty					

# ANNEX A: COURTS MARTIAL

CONTINUATION

Accused	Type	Offence	Description	Disposition	Sentence	Location	Date completed	Language	Appealed
Capt Roney	SCM	124 NDA	Negligent Performance of a Military Duty	Withdrawn	Reprimand and a fine of \$2,000	Gagetown, NB	14 Dec 21	English	
		129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
		129 NDA	Neglect to the Prejudice of Good Order and Discipline	Withdrawn					
MCpl Russell	SCM	129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty	Severe reprimand and a fine of \$2,500	Aldershot, NS	21 Mar 22	English	
		129 NDA	An Act to the Prejudice of Good Order and Discipline	Guilty					
A/Slt Shtepa	SCM	129 NDA	Conduct to the Prejudice of Good Order and Discipline	Guilty	Reprimand and a fine of \$1,000	St-Jean-sur-Richelieu, QC	21 Feb 22	English	
S3 Stewart	SCM	130 NDA (271 CC)	Sexual Assault	Guilty	Imprisonment for 2 years	Kingston, ON	06 Jan 22	English	Yes
		130 NDA (271 CC)	Sexual Assault	Guilty					
Sgt Tait	SCM	130 NDA (271 CC)	Sexual Assault	Not Guilty		Petawawa, ON	13 Jul 21	English	
WO Turner	SCM	130 NDA (271 CC)	Sexual Assault	Guilty	Imprisonment for 9 months and reduction in rank to Sgt	Kingston, ON	28 Jan 22	English	Yes
Cpl Vu	SCM	130 NDA (271 CC)	Sexual Assault	Not guilty		Gatineau, QC	05 Nov 21	English	Yes
		130 NDA (162(1) CC)	Voyeurism	Not guilty					
		130 NDA (162(4) CC)	Publication of Voyeuristic Recordings	Not guilty					
		130 NDA (162.1 CC)	Transmisison of an Intimate Image without Consent	Not guilty					
Pte Waugh	GCM	130 NDA (271 CC)	Sexual Assault	Not responsible on account of mental disorder		Gatineau, QC	10 Dec 21	English	

# ANNEX B: APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

CMAC	Appellant	Respondent	Type of Appeal	Proceedings	Result	Dates	Citation	Appealed
605	Capt Duquette	Her Majesty the Queen	Legality of finding		Partially granted	23 Dec 2021	2021 CMAC 10	Yes
606	Her Majesty the Queen	LS Edwards	Legality of finding		Granted	11 Jun 2021	2021 CMAC 2	Yes
607	Her Majesty the Queen	Capt Crépeau	Legality of finding		Granted	11 Jun 2021	2021 CMAC 2	Yes
608	Her Majesty the Queen	Gnr Fontaine	Legality of finding		Granted	11 Jun 2021	2021 CMAC 2	Yes
609	Her Majesty the Queen	Capt Iredale	Legality of finding		Granted	11 Jun 2021	2021 CMAC 2	Yes
610	Her Majesty the Queen	Cpl Christmas	Legality of finding		Appeal granted; cross-appeal dismissed	15 Dec 2021	2022 CMAC 1	Yes
				Motion to lift the <i>Sine Die</i> adjournment	Granted	26 July 2021		
				Motion to reinstate the stay of proceeding	Dismissed	12 Nov 2021	2021 CMAC 7	
611	S3 Champion	Her Majesty the Queen	Custody Review Hearing		Dismissed	29 Sept 2021	2021 CMAC 4	
612	Her Majesty the Queen	Sgt Proulx	Legality of finding		Granted	17 June 2021	2021 CMAC 3	Yes
613	Cpl Lévesque	Her Majesty the Queen	Legality of finding		Granted	14 Oct 2021	2021 CMAC 6	
614	Her Majesty the Queen	MCpl Cloutier	Legality of finding		Granted	17 June 2021	2021 CMAC 3	Yes
615	Sgt Pépin	Her Majesty the Queen	Legality of finding		Ongoing			
616	Sgt Thibault	Her Majesty the Queen	Legality of finding		Ongoing			
				Motion to allow a new issue to be raised on appeal	Granted	12 Oct 2021	2021 CMAC 5	
				Motion for leave to admit fresh evidence on appeal	Dismissed			
617	Lt(N) Brown	Her Majesty the Queen	Legality of finding		Granted	8 Feb 2022	2022 CMAC 2	Yes
				Motion by the Crown to stay the proceedings	Granted, adjourned <i>sine die</i>	11 June 2021		
				Motion by the Crown to lift the stay	Granted	26 July 2021		
				Motion by Lt(N) Brown to re-instate the stay	Dismissed	12 Nov 2021	2021 CMAC 8	
618	Her Majesty the Queen	Cpl Euler	Legality of finding		Ongoing			
				Motion to quash	Dismissed	17 Nov 2021	2021 CMAC 9	



# ANNEX B: APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

CONTINUATION

CMAC	Appellant	Respondent	Type of Appeal	Proceedings	Result	Dates	Citation	Appealed
619	Her Majesty the Queen	MWO MacPherson	Legality of a termination of proceedings		Ongoing			
620	Bdr Cogswell	Her Majesty the Queen	Legality of finding		Ongoing			
621	Her Majesty the Queen	Pte Vu	Legality of finding		Ongoing			
622	S3 Stewart	Her Majesty the Queen	Legality of finding		Ongoing			
623	Sgt Turner	Her Majesty the Queen	Legality of finding		Ongoing			
624	Her Majesty the Queen	Pte Bruyère	Severity and legality of sentence		Ongoing			

# ANNEX C: APPEALS TO THE SUPREME COURT OF CANADA

SCC #	Appellant	Respondent	Type of Appeal	Result
39543	Sgt McGregor	Her Majesty the Queen	Legality of Finding (appeal by leave)	Ongoing
39820	LS Edwards et al.	Her Majesty the Queen	Legality of Finding (application for leave to appeal)	Ongoing
39822	Sgt Proulx, et al.	Her Majesty the Queen	Legality of Finding (application for leave to appeal)	Ongoing
40046	Cpl Christmas	Her Majesty the Queen	Legality of Finding (application for leave to appeal)	Ongoing
40065	Lt(N) Brown	Her Majesty the Queen	Legality of Finding (application for leave to appeal)	Ongoing
40074	Capt Duquette	Her Majesty the Queen	Legality of Finding (application for leave to appeal)	Ongoing

ANNEX D:  
ANNUAL REPORT 2021-2022  
DIRECTOR OF DEFENCE COUNSEL  
SERVICES





National  
Defence

Défense  
nationale



# ***ANNUAL REPORT 2021- 2022***

**Director  
Defence  
Counsel  
Services**



### **OVERVIEW**

1. This report covers the period from 1 April 2021 to 31 March 2022. It is prepared in accordance with article 101.11(4) of the *Queen's Regulations and Orders for the Canadian Armed Forces (Queen's Regulation and Orders)*, which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services (the Director) and requires that he report annually to the Judge Advocate General (the JAG) on the provision of legal services and the performance of other duties undertaken in furtherance of the mandate of Defence Counsel Services (DCS).

### **ROLE OF DEFENCE COUNSEL SERVICES**

2. Under section 249.17 of the *National Defence Act (NDA)* individuals, whether civilian or military, who are "liable to be charged, dealt with and tried under the Code of Service Discipline" have the "right to be represented in the circumstances and in the manner prescribed in regulations." DCS is the organization that is responsible for assisting individuals exercise these rights.

3. The Director is, under section 249.18 of the *National Defence Act*, appointed by the Minister of National Defence. Section 249.2 provides that the director acts under the "general supervision of the Judge Advocate General" and makes provision for the JAG to exercise this role through "general instructions or guidelines in writing in respect of Defence Counsel Services." Subsection 249.2(3) places on the director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public. No such directive was issued this year.

4. The Director is statutorily mandated at s. 249.19 to "provid[e], and supervis[e] and direc[t]" the provision of Defence Counsel Services. These services may be divided into the categories of "legal advice" where advice of a more summary nature is provided, often delivered as a result of calls to the duty counsel line, and "legal counsel" which typically involves a more sustained solicitor-client relationship with assigned counsel and representation of an accused before a Military Judge, a Court Martial, the Court Martial Appeal Court of Canada (CMAC) or the Supreme Court of Canada (SCC). Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and the Federal Court.

5. Legal advice is provided in situations where:

- a) members are the subject of investigations under the Code of Service Discipline, summary investigations, or boards of inquiry, often at the time when they are being asked to make a statement or otherwise conscripted against themselves;

## *DEFENCE COUNSEL SERVICES*

---

- b) members are arrested or detained, especially in the 48-hour period within which the custody review officer must make a decision as to the individual's release from custody;
  - c) members are considering electing summary trial or waiving their right to court martial;
  - d) members are seeking advice of a general nature in preparation for a hearing by summary trial; and
  - e) members are considering an application before a Commanding Officer to vary an intermittent sentence or the conditions imposed by a summary trial.
  - f) members are considering or preparing a Request for Review of the findings or punishment awarded to them at summary trial.
6. Legal representation by assigned counsel is provided in situations where:
- a) custody review officers decline to release arrested individuals, such that a pre-trial custody hearing before a military judge is required;
  - b) members request or require a judicial review of release conditions imposed by a custody review officer;
  - c) there are reasonable grounds to believe that an accused is unfit to stand trial;
  - d) applications to refer charges to a court martial have been made against individuals;
  - e) members apply to a Military Judge to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the Court Martial Appeal Court in the case of conditions imposed by that Court;
  - f) members are appealing to the Court Martial Appeal Court or to the Supreme Court of Canada, or have made an application for leave to appeal and the Appeal Committee, established in Queen's Regulations and Orders, has approved representation at public expense; and
  - g) in appeals by the Minister of National Defence to the Court Martial Appeal Court or the Supreme Court of Canada, in cases where members wish to be represented by Defence Counsel Services.
7. The statutory duties and functions of DCS are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients.

## ***DEFENCE COUNSEL SERVICES***

---

Where demands for legal services fall outside the DCS mandate, members are advised to seek civilian counsel at their own expense.

8. DCS does not normally have the mandate to represent accused at summary trial. The military justice system relies upon the unit legal advisor, generally a Deputy Judge Advocate, to provide advice to the chain of command on the propriety of charges and the conduct and legality of the summary trial process, all with a view to ensuring that the accused is treated in accordance with the rule of law.

### **THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES**

9. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec.

#### **Military Defence Counsel**

10. The office has consisted of the Director, the Assistant Director and 6 Regular Force legal officers. In addition, 6 Reserve Force legal officers at various locations in Canada assisted on matters part-time.

11. For the first time in the history of DCS, the Director this year requested 5 new Regular Force positions.

12. These new positions are required to enable the Director to adequately fulfill his statutory mandate under s. 249.19 of the *NDA* to “*provid[e] and supervis[e]*” the provision of defence counsel services. These new positions would ensure that military defence counsel have comparable caseloads and supervision to military prosecutors. In addition, these new positions will make possible work-life balance and prevent detrimental turnover within DCS. They will allow much needed retention of litigation expertise and adequate succession planning. Better supervised military defence counsel will contribute to the reduction of delay in the military justice system. Finally, a more even balancing of prosecution and defence resources will favour the appearance of justice.

#### **Administrative Support**

13. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-4 and AS-1, as well as a paralegal at the level of EC-3.

#### **Civilian Counsel**

15. Under the *NDA*, the Director may hire civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by DCS, no uniformed



## ***DEFENCE COUNSEL SERVICES***

---

counsel are in a position to represent the particular individual. This occurs primarily as a result of a real or potential conflict of interest, often involving DCS' representation of a co-accused. It may occur for other reasons as well. During this reporting period, civilian counsel were hired by the Director to advise and/or represent members in 7 files.

### **Funding**

16. During this fiscal year, the following funds were spent.

<b>FUND</b>		<b>EXPENDITURE</b>
C125	Contracting (Counsel, Experts, and Services)	\$202,181.47
L101	Operating Expenditures	\$9,808.75
L111	Civilian Pay and Allowances	\$195,666.64
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$430,300.27
<b>TOTAL</b>		<b>\$837,957.13</b>

17. This amount is less than our initial operating budget of \$859,350.00 and represents stable funding over the past few years.

## **SERVICES, ACTIVITIES AND TRAINING**

### **Duty Counsel Services**

18. Legal advice is available 24 hours a day, seven days a week, to members who are under investigation or in custody. Duty counsel receives 10 to 15 calls per day and sometimes more. Legal advice is typically provided through our duty counsel line, a toll-free number which is distributed throughout the Canadian Armed Forces and is available on our website or through the military police and other authorities likely to be involved in investigations and detentions under the Code of Service Discipline.

### **Court Martial Services**

19. When facing court martial, accused persons have the right to be represented by lawyers from DCS at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.

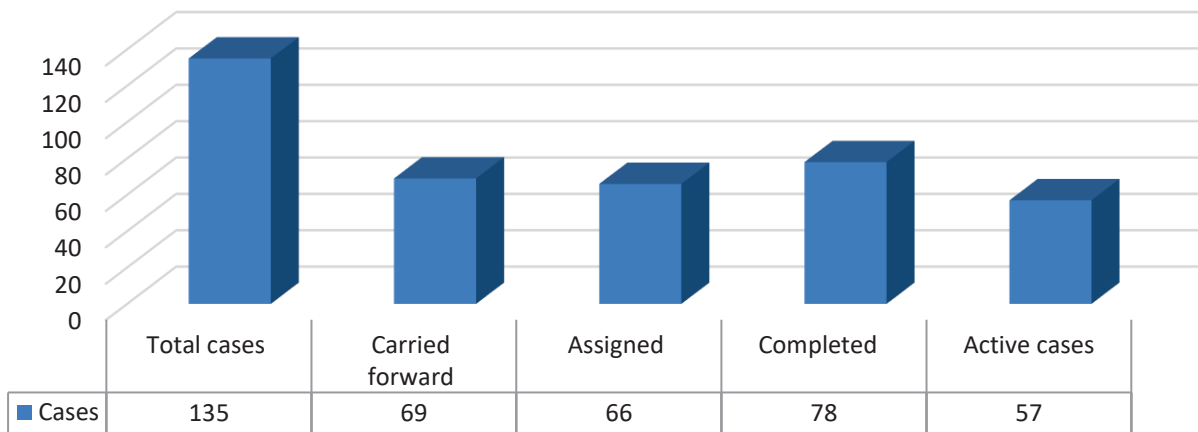
20. During this reporting period, 66 members requested legal counsel to the Director to be represented at court martial. When combined with the 69 cases carried over from the previous reporting period, the caseload for this reporting period was 135 cases.

## ***DEFENCE COUNSEL SERVICES***

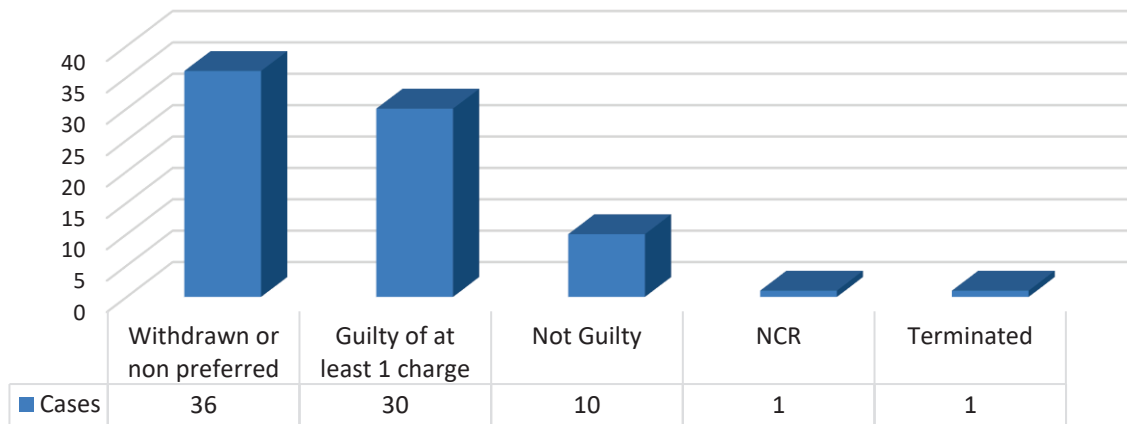
21. Of those 135, 78 cases were completed. And of those 78, 36 members represented by military defence counsel had their charges either withdrawn or not preferred before the convening of a court martial.

22. Military defence counsel represented the accused in 42 courts martial during this reporting period. In 10 cases, the accused was found not guilty of all charges. In 30 cases, the accused was either found guilty or pled guilty to at least one charge. In 1 case, the proceedings were terminated; and in 1 case, the accused was found not criminally responsible for cause of mental disorder (NCR).

**DCS Court Martial Cases Fiscal Year 2021-2022**



**Results of Court Martial Cases Fiscal Year 2021-2022**



### **Appeal Court Services**

23. Where a member is the appellant and is requesting representation at public expense by DCS, he or she is required to make an application to the Appeal Committee, established under *Queen's Regulations and Orders*, who assesses whether the appeal has merit. Members who are responding to appeals by the Minister may receive representation by DCS as a matter of right.

24. DCS worked on 1 appeal before the Supreme Court of Canada (SCC), for which leave was granted, and 17 appeals before the Court Martial Appeal Court of Canada (CMAC). 12 appeals were filed by the Minister and 6 were filed on behalf of the accused. DCS also filed applications for leave to appeal at the SCC in 8 cases.

### ***Supreme Court of Canada***

25. The SCC granted leave to appeal the judgment of the CMAC, *R. v. McGregor*, 2020 CMAC 8. The issue is about the extraterritorial application of the *Canadian Charter of Rights and Freedoms (Charter)*. The hearing of this case is scheduled on May 15, 2022, and will be discussed in the next annual report.

26. The Appeal Committee granted the request for legal representation at public expense of LS Edwards and seven other members (*Edwards et al.*) to file applications for leave to appeal to the SCC. The issue is the independence of the military judge under s. 11d) of the *Charter*. The SCC judgments on leave are under reserve.

### ***Court Martial Appeal Court of Canada***

27. In the 8 cases for which leave to appeal to the SCC was requested (*R v Edwards et al.*), the CMAC found that military judges are independent in accordance with s. 11d) of the *Charter*.

28. In *R v Lévesque*, the CMAC found that the military judge erred in law in ordering the member to be incarcerated in a military prison as opposed to a civilian prison.

29. In the case of *R v Pépin*, 2022 CMAC 4, the CMAC dismissed the appeal finding that the military judge correctly concluded that the accused *Charter* right to silence and right to counsel had not been breached. The CMAC further concluded that a WD instruction to the jury was not necessary in the circumstances.

30. In *R v Thibault*, 2022 CMAC 3, the CMAC dismissed the appeal. The military judge correctly applied the burden of proof and committed an error of little importance in failing to consider evidence of three witnesses that the complainant and the appellant were laughing together in

bed immediately following the sexual activity – despite the fact the complainant denied this evidence.

31. In *R v Euler*, the Minister appealed and contended that the military judge acquitted the accused because she required corroboration of the complainant’s testimony. Corporal Euler contended that the Military Judge did not require corroboration.

32. In *R v MacPherson*, the Minister appealed and argued that the military judge erred by finding it lacked jurisdiction over a sexual assault allegedly committed back in 1998. The appeal was heard and judgment is pending.

33. In *R v Vu*, the Minister is appealing on the basis that the military judge erred in concluding that there could be no reasonable doubt that the complainant was incapable to consent. The appeal has not yet been heard.

34. In *R v Stewart*, the member appealed for two reasons. First, the military judge erroneously dismissed the appellant’s application under s. 278.93 to introduce evidence of the complainant’s “other sexual activity”. Second, the military judge erroneously dismissed the appellant’s lost evidence application by ruling the complainant’s lost statement simply did not exist. The appeal has not yet been heard.

35. In *R v Turner*, the member is appealing on a number of grounds including the judicial independence issue presently before the SCC in the application for leave to appeal in *Edwards et al*. Factums have not been produced to date.

36. In *R v Bruyère*, the Minister is appealing the sentence. Factums have not been produced to date.

### **Professional Development**

37. Due to the COVID pandemic, professional development opportunities have been limited to *ad hoc* on-line individual legal training and the virtual JAG Continuing Legal Education week.

### **CONCLUSION**

38. This year again, legal officers within DCS have provided outstanding legal services to qualifying members of the military community who request our assistance. I am particularly proud of our legal officers who responded to the call of duty and courageously travelled throughout Canada to protect the rights of our members in the context of the pandemic. We owe them our greatest respect for their dedication.

## *DEFENCE COUNSEL SERVICES*

---

39. My priority has always been to promote an environment where clients can trust that their defence counsel is not only professionally competent but also independent from government.

LETOURNEAU,  Digitally signed by  
LETOURNEAU, MARK 562  
Date: 2023.06.20 17:00:16  
-04'00'

Mark Létourneau  
Commander  
Assistant Director of Defence Counsel Services

29 June 2022